Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

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ROBBYN BROWN,

*Petitioner*

v.

JOHN H. SNOW, et al,

*Respondents*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Seventh Circuit.

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the District Court's refusal to enforce its own Protective Order constitutes an abuse of discretion? If so, then whether the trial court misapplied the law when it granted summary judgment and/or judgment as a matter of law based upon that lack of evidence (i.e. evidence that had been requested, but never provided)?

2. Whether a performance appraisal that is theoretically based upon objective criteria is accorded a presumption of correction, and therefore unchallengeable under 42 U.S.C. § 2000e-2(m) and §107 of the Civil Rights Act of 1991?

3. Whether employment information sought supporting alleged discriminatory performance appraisals is subject to review via discovery? If so, then whether IRS's refusal to provide said information should have been subject to a Rule 37 sanction, a missing evidence inference, and/or the redress provided for in 29 C.F.R. § 1614.108?

4. Whether the trial court misapplied the law when it refused to consider all reasonable inferences in my favor, when it granted summary judgment or judgment as a matter of law?

5. Whether the trial court's refusal to allow me to pursue my hostile working environment claim misapplied the law?

6. Whether the IRS was free to orally disclose under the Privacy Act, (5 U.S.C. § 552a(b)), any information about my work performance, EEO complaints filed, or other employment-related records once contained in its system of records after it had purportedly physically removed from those records from its system of records?

7. Whether a defendant's deliberate refusal or avoidance of delivery of the Waiver of Summons sent via certified mail rises to the "rare" level of "good cause" that is required to be shown under the Advisory Committee Notes of Rule 4(d) of the Federal Rules of Civil Procedure?

8. Whether the Waiver of Summons mailed postage paid first-class is presumed delivered under Rule 4(d) of the Federal Rules of Civil Procedure in conjunction with United States v. Chem. Found., Inc., 272 U.S. 1, 14-15?

## PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Seventh Circuit were:

ROBBYN BROWN, appellant;
JOHN H. SNOW, appellee;
DORIAN MORLEY, appellee;
DELORIS FEATHERSTONE, appellee.
KATHLEEN SWAIN, appellee

## CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement is required in that there are no nongovernmental corporate parties in this matter.

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## OPINIONS AND ORDERS BELOW

The opinion and order of the Seventh Circuit is unreported and is reproduced in the Appendix.

The opinion and orders of the United States District Court for the Southern District of Illinois that are at issue are reproduced in the Appendix.

## JURISDICTION OF THIS COURT

The judgment of the Seventh Circuit was entered on April 06, 2004. This Court has jurisdiction to review the judgment of the Seventh Circuit under *28 U.S.C. § 1254(1).*

## STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 552a(b)(1) (Privacy Act) states that:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

42 U.S.C. § 2000e-2(a) states that:

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

An "unlawful employment practice is defined in the same statute. Under *42 U.S.C. § 2000e-2(m)*:

Except as otherwise provided in this title [*42 USCS § § 2000e* et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

*42 U.S.C. § 2000e-3(a)* states that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any

individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

29 C.F.R. 1614.108(c) states that:

The procedures in paragraphs (c)(1) through (3) of this section apply to the investigation of complaints:
(1) The complainant, the agency, and any employee of a Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.
(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.
(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:
(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;
(iv) Issue a decision fully or partially in favor of the

opposing party; or
(v) Take such other actions as it deems appropriate.

## STATEMENT OF THE CASE

The crux of this case is four-fold:
(1) Whether race or sex was a motivating factor in any employment practice, namely performance appraisals, and the promotions that were based upon them;
(2) Whether the IRS retaliated against me after I filed my initial complaint;
(3) Whether the IRS created a hostile working environment; and
(4) Whether the IRS violated the Privacy Act when it made disclosures about my work performance and me to my coworkers?
(5) Further, to what extent must the IRS comply with the EEOC regulations, 29 C.F.R. § 1614 regarding time limitations for processing cases and whether the remedies for violating those mandates are available at trial?

In December 1994, while working under Richard Knowles (Mr. Knowles), I was assigned to Grand Jury to replace a white male revenue agent who had recently been promoted to a GS-13 position. The investigation was a highly publicized case that resulted in criminal convictions. Upon the conclusion of the Grand Jury assignment and after I had prepared the Stipulation Plea Agreements, I was reassigned to Kathleen Swain's Examination Group 1708.

Ms. Swain subsequently informed me that Mr. Knowles had assigned all the cases that were related to this

Grand Jury investigation (whether prosecuted or not) to Timothy Neighbors, a white male for the civil examination. According to Ms. Swain, Mr. Neighbors made civil fraud referrals on these cases prior to making contact with those taxpayers or their representatives for the sole purpose of generating fraud statistics. I demonstrated at trial that Neighbors had a conflict with these returns and that Mr. Knowles should not have assigned those returns to him. (Trial Exhibit 8 in conjunction with Examination Division Chief Patricia Leatherwood's testimony) (See Appendix pp. 113A-118A; 155A). Upon Neighbor's selection for the GS-13 position, those returns were immediately reassigned primarily to GS-11 female revenue agents, who did not receive commendatory memorandums for their work, nor did they receive higher-graded duty pay (Knowles trial testimony - See Appendix p.118A).

According to the Catherine Gilmore's (now known as Catherine Murphy) affidavits and trial testimony, in some of those referrals made by Mr. Neighbors, the taxpayers actually reported the income at issue, thereby negating the necessity of the premature referrals. In the IRS, fraud referrals are looked upon very favorably (Appendix p. 119A). I also demonstrated at trial that Mr. Knowles had a history of assigning better returns to Mr. Neighbors (Appendix pp. 138A-145A). Given the foregoing, it is my contention Mr. Knowles assigned those returns stemming from my Grand Jury assignment to Mr. Neighbors with the intent to place him in a more favorable competitive position over me and to pump up his evaluation.

While employed under Mr. Knowles, he shared with me negative information about other females or minorities employed by the IRS. The discussions about the female agents consisted primarily of whom they slept with in being promoted. One discussion about a black male revenue agent

centered on his competence. He also made comments on more than one occasion as to my per capita income exceeding his.

After filing my initial complaint, my supervisor at the time Kathleen Swain provided me a negative performance evaluation that she and her supervisor, Deloris Featherstone had prepared. She told me that I was an intelligent person and could figure it out. Thereafter, I was subjected to increased work scrutiny, including multiple case file reviews and workload reviews. Ms. Swain didn't stop there. She then began a campaign of providing false and negative information about me professionally and my work performance to my coworkers in an attempt to ostracize me. This culminated in a hostile work environment (Appendix pp. 69A-74A; 76A-90A; and 91A-95A).

During the administrative processing of my complaint, I repeatedly requested the agency secure the information before it was destroyed. My requests were ignored.

Discovery Abuses and Evidence Exclusions:

The required de novo review of the summary judgment and judgment as a matter of law orders cannot possibly be accomplished without first reviewing the abuses that took place during the administrative and discovery phases, and the evidentiary exclusions made at trial. If these abuses and exclusions denied me the opportunity to fully and fairly litigate my case based upon its merits, then my constitutional right to due process has been denied.

The panel decision states I presented "nothing to convince them" the court abused its discretion with respect to

discovery (Appendix pp. 1-7A at p.7A). I respectfully remind the court that I am a pro se appellant without legal assistance and the Supreme Court has held that pro se briefs and pleadings are not to be held to the same legal standards as those of trained attorneys (Estelle v. Gamble, 429 U.S. 97, 106 (1976)). However at pages 27-29 of Appellant's Brief, I stated (with citations to the record) that I was a visibly pregnant pro se plaintiff who was given what amounted to a 2-month discovery period after I returned from maternity leave and was denied records highly relevant to my case (Appendix 24A-38A). The court granted a Protective Order to facilitate the release of the records (Appendix 11A-13A). Mr. Llewellyn continued to refuse to provide them. I petitioned the court to enforce its Protective Order (Appendix 14A-21A). The Court did not (Appendix pp. 22-23). Further, Mr. Llewellyn refused to allow me to depose defendants, Kathleen Swain and Delores Featherstone. Had I had that opportunity, I could have followed up on Swain's removal as the Taxpayer Advocate for similar EEO violations (Trial Day 5, pp. 120-121) and Swain's affidavit that Richard Knowles had said that she slept with her supervisor in order to get her promotion (Trial Day 3, pp. 113-126; Trial Day 4, pp. 3-17).

The Court also refused to allow into evidence, undisputed statements Knowles made to me about other females in the office who he alleges slept around in getting their promotions, any evidence of the hostile work environment cultivated by Swain including her unauthorized disclosures in violation of the Privacy Act (Appendix pp. 69A-90A; 91A-95A), and statements Swain made to me that Neighbors had not worked any complex corporate returns. The hostile work environment (Transcript 01/31/03, pp. 60-63), increased work scrutiny, and Privacy Act violations were other wrongs or acts that are admissible under Rule 404(b) of the F.R.E. Swain's statements to me regarding Neighbors'

lack of complex corporate return work was admissible under Rule 801(d)(2) of the F.R.E.

The trial court's decision to grant summary judgment and judgment as a matter of law (Appendix pp. 46A-68A), predicated to a large degree upon the lack of evidence, (evidence which I requested, was entitled to under Discovery and the subsequent Protective Order, but was never provided) was an abuse of discretion. Before issuing a directed verdict, the court is required to consider "all available inferences" in favor of the nonmoving party. (See Anderson, supra). This is not discretionary, but rather a mandate from the Supreme Court. Without considering the adverse inferences of the missing evidence doctrine, and 29 C.F.R. § 1614.108, the court misapplied the law. Further, it rewarded the IRS and its counsel for its contempt and abuse of the administrative and discovery processes, did not level the evidentiary playing field, denied me due process and the right to a trial by jury.

Despite the Court not enforcing its Protective Order, I demonstrated at trial: (1) the criteria for the position in the failure to promote decisions (Trial Ex. 58), (2) the IRS maintained documents / systems that would have objectively established whether employees had met that criteria for the position (Transcript Day 1, pgs 76-89; Trial Exh. 5-8) (Appendix pp. 131A; 145A-146A – Transcript p. 99, lines 1-18); (3) undisputed evidence that I met those criteria (Transcript Day 1, pages 64-70, Defendant's Answer, Docket Doc. 13, page 8, ¶ 25, Trial Exhibits 63,65 and 72); (4) I was the only GS-12 in the downstate area who did not have a temporary GS13 promotion that had been transferred into LMSB (Transcript Day 1, pp. 78-79, Day 3, pp. 46-51) (Appendix pp. 120A-130A); (5) the IRS used the streamlined approach for evaluating the promotion package such that only the performance appraisals and awards were considered (Trial Exh. 4 & 28, pg. 5, Sect. K); (6) I was the only minority and the only female out of the four candidates that made the best

qualified list, and the only candidate that the IRS violated the streamlined approach with when it lowered only my numbers; (Trial Exh. 4); (7) as in Reeves, the de facto decisionmakers in the failure to promote counts were actually Featherstone in conjunction with Knowles and Swain; (Trial Day 4, pp. 170-172; 202-206); (8) retaliatory animus displayed by Swain and Featherstone including increased work scrutiny (Trial Ex. 15-19) and attempts to lower my evaluation (Trial Ex. 26, 29-30, 32-33; (8) the unlawful discriminatory practices that went in to Neighbors performance appraisals (i.e. race or sex being motivating factors), which subsequently formed the basis for his selection; and (9) as in Reeves, a jury issue as to the falsity of the IRS's explanation.

After having refused to provide the supporting information for the challenged performance appraisals, the IRS rests its case solely on the fact that Knowles provided Neighbors a more favorable appraisal. However, the unambiguous language of 42 U.S.C. § 2000e-2(m) provides no presumption of correction for that appraisal. To hold otherwise, discriminatory employers need only provide the least qualified candidate with an exceptional performance appraisal to hide or shield their unlawful employment practices, waltz into court with it, and that would be the end of the case. The performance appraisal then becomes for employment matters what the "poll tax" was for voting matters.

The panel decision states that Neighbors performed the job of the GS-13. That is a disputed question of fact that is reserved for the jury not the judge. The record reflects the IRS refused to provide any evidence that Neighbors actually performed the job. It is undisputed that he occupied the position.

If Neighbors had done the work of the job, and performed well, why would the IRS not have released that

information during the administrative processing of this case and during discovery? Why did the IRS's co-counsel Dee Jarrett Dow continue to argue before the EEOC over an 18-month period that Featherstone never told the EEO Counselor she had knowledge of my initial complaint at the time it was filed (Appendix pp. 99A-107A)? Didn't Dow as an officer of the court have a responsibility to ask Featherstone and then to inform the EEOC that the IRS's initial assertions were incorrect (Appendix pp. 108A-112A)? Why would they have subsequently destroyed that information when they knew it was the subject of a lawsuit? Why would Knowles have evaluated Neighbors, per Knowles own admission, as a GS 12 rather than the GS 13 position he was currently occupying (Transcript Day 4 pp. 121-123) (Appendix pp. 148A-150A)?

If Knowles were not assigning white males more favorable assignments, why would the IRS have refused to provide the computer data that would have attested to this? Why would they have subsequently destroyed this information when they knew it was the subject of a lawsuit? Why would Knowles have assigned Neighbors those fraud related returns with the tax already determined when Knowles knew Neighbors had a potential conflict of interest (Trial Ex. 8)? Why would Knowles have assigned those same returns to GS-11 female agents after Neighbors had received the commendatory memos and the promotion? Why did Knowles not recommend the females agents for commendatory memos or awards for working these same type of cases (Trial Day 4, pp. 34-38)? Further the court overlooked the testimony (Trial Day 3, pp. 76-79) (Appendix pp. 156A-159A) and affidavit (Docket Doc. 91, Ex. H) of Catherine Gilmore (Murphy) and the affidavit of Yolanda Carothers-Tharpe, (Docket Doc. 91, Exhibit G) a former IRS group manager, that Neighbors had been assigned more productive returns (Appendix pp. 160A-161A).

Summary Judgment & Judgment as a Matter of Law

The panel decision states, "although the district court framed its conclusion in terms of whether Brown made out a prima facie case, on review we need only ask whether the evidence reasonably supports Brown's claims". The district court actually told me I had not set out a prima facie case (Appendix pp. 8A-10A). The panel decision implicitly recognizing this as having been in error, however, is inconsistent with the standard set out in Reeves v. Sanderson, 530 U.S. 133, 150 and Anderson v. Liberty Lobby, Inc., 477 at pages 250-251. In Anderson, supra, the Supreme Court stated the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) is as follows:
"...the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern R. Co., 320 U.S. 476, 479-480 (1943). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949)."

Further in determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party, draw all reasonable and justifiable inferences in favor of that party, not make credibility determinations or weigh the evidence which are functions of the jury and not the judge, (Anderson, at 255) and must disregard evidence that would appear to be favorable to the moving party that the jury would not have been required to believe (Reeves, at 151).

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case,

suffice to show intentional discrimination" (Reeves, at 147).

Having presented the elements of my prima facie case, I demonstrated at trial uncontroverted and undisputed evidence that I worked the type of returns required for the GS-13 position. I also demonstrated at trial the increased work scrutiny I was subjected to after filing my initial complaint, negative performance evaluations that Swain began to issue after I filed the complaint, both Swain and Featherstone's having falsely stated initially they had no knowledge of my initial complaint (Appendix 108A-112A), and a document they submitted after I filed my complaint stating I was failing in my job (Trial Exhibit 33) despite the IRS previous answer that at all relevant times I had met or exceeded their expectations.

Civil Rights Act of 1991 and 42 U.S.C. 2000e-2(m):

The panel decision states that "However, absent any showing that those assignments were motivated by racial preference or animus, *see McPhaul,* 226 F.3d at 565, this conclusory assertion is not enough to overcome judgment as a matter of law".

This standard is suggestive of a heightened direct evidence requirement that conflicts with the clear statutory language of the Civil Rights Act of 1991 as codified at 42 U.S.C. 2000e-2(m) and with the unanimous Supreme Court decision in Desert Palace Inc., dba Caesars Palace Hotel v. Costa, 539 U.S. 90.

42 USC 2000e-2(m) states:
"Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color,

religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Therefore the standard is not whether those assignments were motivated by race or sex, but whether race or sex were motivating factors in any employment practice, even though other factors may have motivated the decisions. Neither the trial court nor the panel decision addressed the retaliation claim with respect to the 1998 promotion and the hostile working environment claims, which were part of my initial complaint (Appendix 96A-98A) and which I continue to raise on appeal.

The Supreme Court in Desert Palace Inc., 539 U.S. 90, relying upon its decision in Connecticut Nat. Bank, at pages 253-254 (i.e. where the words of the statute are unambiguous, the "judicial inquiry is complete), rejected the direct evidence standard as conflicting with the clear statutory language of the 42 U.S.C. § 2000e . The Court held that under *§ 2000e-2(m)*, a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice." Id at 95-96.

Based upon the unambiguous language of the statute, a performance appraisal clearly being an employment practice is actionable if race or sex is a motivating factor in it contents. Having demonstrated at trial that Knowles steered more productive returns to Neighbors while not doing the same for minorities or the females in the group (Trial Day 4 pp. 90-115) (Appendix pp. 138A-a46A), steered the civil fraud referrals on cases that I worked to Neighbors despite Neighbors having a conflict of interest (Appendix p.117A), and then Neighbors having received several commendatory

memos from that work (Appendix 115A–116A –Transcript p. 32, lines 4-10), all of which factored into his evaluation, this created genuine issues of fact for the jury to decide.

Privacy Act:

Applying the plain language doctrine of Connecticut Nat. Bank, supra, the Privacy Act states that a disclosure by "any means of communication" is a violation. Overlooking Swain's unauthorized oral disclosures, the trial court as well as the panel decision confined its review and discussion to what Pagan or Hudgins may or may not have seen. The undisputed fact that Swain orally discussed my work performance or any employment matters concerning me with either Pagan or Hudgins clearly violates the Privacy Act (Docket Doc. 91, Exhibits P, Deposition of Cheryl Pagan, pp. 14-37 (Appendix pp. 69A-90A) and Exhibit Q, Deposition of Karen Hudgins, pp. 14-15, 38, lines 19-25) (Appendix pp. 91A-95A).

The panel decision is silent with respect to the hostile working environment claim (Appendix pp. 1A-7A) and therefore overlooks the standards set out in National Railroad Passenger Corporation v. Morgan, 536 U.S. 101; 122 S. Ct. 2061, Harris v. Forklift, 510 U.S. 17 and Merritor Sav. Bank, FSB v. Vinson, 477 U.S. 57. There's no question that I perceived it as hostile and so did my coworkers Pagan and Hudgins per their depositions referred to above. The 7th Circuit held in Knox v. Indiana, 93 F 3d 1327, 1334 that retaliating against a complainant by permitting her fellow employees to punish her violates Title VII. Further the panel decision summarizes the retaliation issues without applying the standards set out in National Railroad Passenger Corporation v. Morgan, 536 U.S. 101. Not having been allowed to pursue this cogent claim that was set out in my initial complaint, due process has been denied.

Waiver of Summons

In response to my complaint, Defendants suggested I had not properly served Defendants Swain, Featherstone, and Morley. In response, I sent a Waiver of Summons form supplied by the Court to each of them via certified mail. Concerned that Swain would not claim the certified letter, I also sent Swain the same "Waiver" postage paid by regular mail to the same address. The waiver sent by regular mail was never returned (Docs. 35 and 41). AUSA Llewellyn never addressed the waiver sent by regular mail.

Featherstone and Morley returned their waivers. Swain did not. The Post Office sent several notices to Swain to pick up the certified letter. I then formally served Swain and requested reimbursement of the costs for service of the summons. In their response, Swain through her Counsel AUSA Nicholas Llewellyn falsely stated Swain resided in Missouri and not Illinois (Doc. 37, para. 1). Upon being presented with evidence refuting this, Swain through Llewellyn recanted (Appendix 39A-43A). Given Swain and Llewellyn false statements to the Court and Swain's intentionally ignoring the certified mail, costs incurred in effecting service should have been imposed upon her per Fed.R.Civ.P.4. (See Appendix pp. 44A-45A).

Trial Court's Jurisdiction:

Jurisdiction was vested in the United States District Court for the Southern District of Illinois under Title VII of the Civil Rights Act of 1964, (42 USC§ 2000e et seq.); The Civil Rights Act of 1991, (42 USC § 1981a); The Privacy

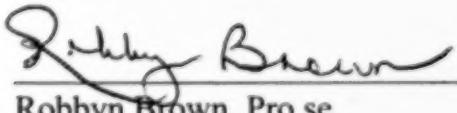
Act (5 USC § 552a); The Freedom of Information Act (5 USC 552); and 28 USC §§1331 and 1343.

**REASONS FOR GRANTING THE WRIT**

Because the judicial proceedings during the discovery phase departed far from the accepted and usual course of proceedings and the panel decision by the 7th Circuit sanctioned such a departure, the exercise of the Supreme Court's supervisory power is needed to protect my constitutional right to due process.

Further, certiorari should be granted to restore the plain textual meaning of the Privacy Act and Civil Rights Act of 1991 statutes and to remove the conflicts the 7th Circuit has taken with the cited relevant decisions of the Supreme Court.

Respectfully submitted,



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# PETITION FOR WRIT OF CERTIORARI - APPENDIX

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10. District Court Order Denying Motion to Modify Approved Scheduling and Discovery Order - (Doc. 55) 38A

11. Plaintiff's Reply Brief in Support for Recovery of Costs Against Kathleen Swain for Failure to Waive Service of Summons (Doc. 41) 39A-43A

12. District Court Memorandum and Order Denying Recovery of Costs for Failure to Waive Service of Summons - (Doc. 43) 44A-45A

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14. Deposition of Cheryl Pagan – (Pages 14-38; 53-55) 69A-90A

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18. Deloris Featherstone's Trial Testimony (Conceding she did tell the EEO Counselor she was unaware of my complaint when in fact she was) 108A-112A

19. Richard Knowles' Trial Testimony Day 4 112A-150A

20. Patricia Leatherwood's Trial Testimony Day 4 150A-156A

21. Catherine (Gilmore) Murphy's Trial Testimony 156A-159A

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# APPENDIX

ROBBYN BROWN, Plaintiff-Appellant, v.
JOHN W. SNOW, Secretary of the Treasury, et al., Defendants-Appellees.

No. 03-2181

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

March 19, 2004 *, Submitted
April 6, 2004, Decided

* After examining the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a)(2).

**NOTICE:** RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**PRIOR HISTORY:** Appeal from the United States District Court for the Southern District of Illinois. No. 99-CV-0745. David R. Herndon, Judge.

**DISPOSITION:** Affirmed.

**COUNSEL:** ROBBYN BROWN, Plaintiff - Appellant, Pro se, O'Fallon, IL USA.

For JOHN W. SNOW, DORIAN MORLEY, DELORIS FEATHERSTONE, KATHLEEN SWAIN, Defendants - Appellees: Nicholas P. Llewellyn, OFFICE OF THE UNITED STATES ATTORNEY, St. Louis, MO USA.

**JUDGES:** Before Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge.

**OPINION:**

ORDER

In 1996, Robbyn Brown, an accountant employed by the Internal Revenue Service in southern Illinois, applied for a promotion to the position of Temporary Grade 13 Revenue Agent. Her qualifications were good--on a scale of 1 to 5, her employee evaluations were in the 4-5 range. But the position went to Tim Neighbors, a white co-worker whose score in the comparative ranking for the position was higher than Brown's. The episode repeated itself in 1998, when there was an opening for the same position on a permanent basis. Neighbors was again selected over Brown--not surprisingly, given that he had by then been doing identical work in the temporary position for two years.

Brown, however, was convinced that neither of the decisions was justified and that the IRS had discriminated against her as a black woman, in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C. 2000e et seq.* Specifically, she believed that her manager, Richard Knowles, had deliberately and discriminatorily given easier assignments to Neighbors, helping him to compile a better work record--and thus obtain an unfair advantage--in the period leading up to the 1996 promotion. She contacted an EEO counselor about her concerns soon after the 1996 decision, and eventually filed a series of formal EEO complaints with the Regional Complaint Center of the

Department of the Treasury. After the Center issued its final agency decision in June 1999, Brown filed a lawsuit in the district court.

Brown's fourteen-count complaint was centered on the 1996 and 1998 promotion decisions, but it encompassed a number of related issues as well. Several counts, brought under Title VII, concerned actions taken before the promotion decisions--primarily Knowles giving easier assignments to Neighbors--while others focused on events following Brown's initiation of EEO activity, including various forms of alleged retaliation--such as negative performance evaluations, refusal to give her desirable "acting manager" assignments, and denial of extra pay for work above her pay-grade level. In addition to these claims, Brown alleged that Kathleen Swain, who replaced Knowles as her manager in 1996, violated the Privacy Act, *5 U.S.C. § 552a*, by disclosing materials from Brown's EEO file. Finally, she alleged that various constitutional violations--primarily the denial of due process and equal protection--were committed in the course of the EEO investigation.

Of the complaint's fourteen counts, some were dismissed, others were disposed of at summary judgment, and the remainder went to trial. The district court dismissed the constitutional claims, pointing out that Title VII is the exclusive remedy for federal employees alleging discriminatory employment practices. *See Brown v. General Services Administration, 425 U.S. 820, 835, 48 L. Ed. 2d 402, 96 S. Ct. 1961 (1976).* The court also dismissed the claims that Knowles had treated Brown unfairly before the 1996 promotion decision, finding that Brown failed to exhaust her administrative remedies because she did not contact an EEO counselor within 45 days of the alleged events. *See 29 C.F.R. § 1614.105(a)(1).*

After discovery, the defendants moved for summary judgment on the counts of improper disclosure under the

Privacy Act. The court considered the two alleged instances of disclosure: (1) Swain asking a co-worker, Cheryl Pagan, to proofread her responses to a questionnaire given to her in connection with Brown's EEO claim (which Pagan declined to do, and consequently never saw either the questionnaire or Swain's responses); (2) another co-worker, Karen Hudgins, seeing what she vaguely described as "something relating to an EEO file" but which was never identified nor shown to have been part of Brown's EEO file. Finding that neither of these events was a "disclosure," the court granted the motion for summary judgment on the Privacy Act claims. The court also granted summary judgment on the counts alleging discrimination and retaliation through negative performance evaluations and various forms of "increased work scrutiny" because, the court found, these did not amount to adverse employment actions.

The remaining counts (involving the 1996 and 1998 promotion decisions, the denial of acting manager assignments, and the denial of proper compensation for higher grade duty work) went to trial. After the evidence was presented, the court concluded that Brown "failed to establish a prima facie case" for any of the remaining counts: the evidence showed that Neighbors was more qualified than Brown for the positions in 1996 and in 1998; that the denial of acting manager assignments was not an adverse employment action; and that Brown was not entitled to increased pay for the higher grade-level assignments she had worked on. The court therefore granted the defendants judgment as a matter of law.

Brown's chief argument on appeal is that the evidence she presented did make out a prima facie case that the Department's promotion decisions were discriminatory. (She does not present any cogent argument challenging the court's other post-trial conclusions.) A prima facie case is, of course, the first step of the familiar *McDonnell Douglas* indirect

method of proof. *See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).* However, as we have repeatedly emphasized, the burden-shifting method of *McDonnell Douglas* is appropriate only for purposes of summary judgment; after the evidence has been presented at trial, the question is simply whether that evidence is sufficient to allow a reasonable jury to find in favor of the plaintiff. *See Staples v. Pepsi-Cola Gen. Bottlers, Inc., 312 F.3d 294, 299 (7th Cir. 2002); Hall v. Gary Cmty. Sch. Corp., 298 F.3d 672, 675 (7th Cir. 2002).* So although the district court framed its conclusion in terms of whether Brown made out a prima facie case, on review we need only ask whether the evidence reasonably supports Brown's claims.

Under either standard, however, it is clear that the evidence in this case does not support Brown's allegation that the Department's promotion of Neighbors was discriminatory: it is undisputed that Neighbors' rating was better than Brown's. Brown argues, nevertheless, that Neighbors' superior rating was made possible only by Knowles' favoritism toward him in the distribution of assignments--that, in effect, she was "set up to fail" in comparison. *See Herrnreiter v. Chicago Hous. Auth., 315 F.3d 742, 746 (7th Cir. 2002); McPhaul v. Bd. of Comm'rs of Madison County, 226 F.3d 558, 565 (7th Cir. 2000).* But although Brown spent much of the five-day trial trying to show the connection between the assignments Neighbors received and his ultimate ranking, the court found there to be no objective evidence of such a connection, concluding that Brown was "the only one [of those who testified] that seemed to believe that [Neighbors' assignments] were ... easier cases." Brown tries to refute this conclusion by restating her belief that the assignments given to Neighbors allowed him to obtain an artificially high rating. However, absent any showing that those assignments were motivated by racial preference or animus, *see McPhaul, 226 F.3d at 565*, this

conclusory assertion is not enough to overcome judgment as a matter of law.

Brown also challenges the district court's grant of summary judgment on her Privacy Act claims. The Privacy Act, *5 U.S.C. § 552a(b)*, prohibits an agency from "disclosing any record which is contained in a system of records" without authorization. *See United States Dep't of the Navy v. Fed. Labor Relations Auth., 975 F.2d 348, 350 (7th Cir. 1992)* The district court found no evidence that any such record was ever disclosed, given that Pagan never looked at the documents Swain asked her to proofread and that Hudgins could neither identify the document she saw nor affirm that it came from Brown's EEO file. Brown suggests that by requiring her to identify a specific document, the court placed an unwarranted burden on her to "know when or have an inventory of what contents were disclosed." But the burden is on the plaintiff at the summary judgment stage to come forward with specific evidence in the record that supports her claim and creates a genuine issue of material fact. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Morfin v. City of East Chicago, 349 F.3d 989, 1002 (7th Cir. 2003).* Because Brown was unable to do this, summary judgment was proper.

Brown's other arguments are less fully developed. She suggests that the district court incorrectly concluded that a negative performance evaluation was not an adverse employment action. She argues that the court focused only on the numerical aspect of the evaluation, which was favorable to her, and ignored the "negative and vindictive narrative" accompanying those numbers. But she doesn't even tell us what that narrative said, let alone show how it was vindictive and negative. So even assuming that a negative performance evaluation can be an adverse action for Title VII purposes (though it generally cannot, *see Johnson v. Cambridge*

*Indus., Inc., 325 F.3d 892, 902 (7th Cir. 2003))*, we have no basis for disagreeing with the district court's conclusion.

Brown's remaining arguments concern administrative matters (such as discovery and sanctions) over which the district court has broad discretion, *see United States v. Pearson, 340 F.3d 459, 467 (7th Cir. 2003)* (discovery); *Cerutti v. BASF Corp., 349 F.3d 1055, 1067 (7th Cir. 2003)* (sanctions), and she presents nothing to convince us that the court abused that discretion.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

**MINUTES OF JURY TRIAL**

DATE: February 14,2003 DAY: 5 (last)
CASE NO. 99-745-DRH
PRESIDING: David R. Herndon
(Filed February 14, 2003)

ROBBYN BROWN, Plaintiff vs. Lawrence H. Summers, et al, Defendant

CASE NO. 99-745-DRH

REPORTER: /s/ Laura Blatz
COURTROOM DEPUTY: Patty Brown
CONVENED: 9:00
ADJOURNED: 5:30

CIVIL: X

RECESS: 12:30 – 1:30

Counsel for Plaintiff(s): Robbyn Brown
Counsel for Defendant(s): Nicholas Llewellyn

* * *

COMMENTS:

Motion for judgment as a matter of law is argued and granted. Court finds that plaintiff has failed to establish a prima facie case of race or sex discrimination. Court dismisses Counts 5, 9, 10 & 11.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. JOHN W. SNOW, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

CASE NO. 99-745-DRH

**JUDGMENT IN A CIVIL CASE**

(Filed February 25, 2003)

JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and are now before the Court on Defendant John Snow's motion for judgment as a matter of law.

IT IS ORDERED AND ADJUDGED for the reasons stated on the record in open court that the Defendant's motion is **GRANTED** and Counts V, IX, and XI are **DISMISSED**. Judgment is entered in favor of Defendant **JOHN W. SNOW**, Secretary of the Treasury, and against Plaintiff **ROBBYN BROWN.**

**IT IS FURTHER ORDERED AND ADJUDGED** that all remaining counts against all Defendants are **DISMISSED.** Judgment is entered in favor of Defendants **JOHN W. SNOW, DORIAN MORLEY, DELORIS FEATHERSTONE AND KATHLEEN SWAIN** and against Plaintiff **ROBBYN BROWN.**

NORBERT G. JAWORSKI, CLERK
By /s/ Patty Brown
Deputy Clerk

EOD 2-27-03

February 25, 2003

/s/ David R. Herndon
**DAVID R. HERNDON**
**U.S. DISTRICT JUDGE**

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. Lawrence H. Summers, et al, Defendant
CASE NO. 99-745-DRH

ORDER

(Filed January 10, 2001)

Before the Court is plaintiff's Robbyn Brown's, Motion for Protective Order (Doc. 46), filed November 29, 2000. Plaintiff moves the Court to enter a Protective Order to govern the release to plaintiff of material protected by the Privacy Act, **5 U.S.C. § 552 *et seq.*** Defendants do not oppose a Protective Order and submit a proposed Protective Order.

**5 U.S.C. § 552a(b)** provides as follows:

Conditions of disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be-

* * *

(11) pursuant to the order of a court of competent jurisdiction;...

**5 U.S.C. § 552a(b).** The Privacy generally prohibits the federal government from disclosing personal information about an individual without the individual's consent, **5 U.S.C. § 552a(b)**, but contains an exception for disclosure of information pursuant to court order. Congress enacted the

Privacy Act in order to protect the privacy of personal and financial data maintained in federal information systems. The Act regulates the "collection, maintenance, use, and dissemination of information by such agencies." ***Kimberlin v. U.S. Dept. of Justice,* 788 F.2d 434,436 (7th Cir.1986) (citing Statement of Purpose of Dec. 31, 1974, Pub.L.No. 93-579, §2, 88 Stat. 1896).**

**Rule 26(c) of the Federal Rules of Civil Procedure** that protective orders are to be entered for "good cause." The determination of good cause is within the discretion of the Court and cannot be left to the parties, and a showing of particularized good cause must be made. In ***Citizens First National Bank of Princeton v. Cincinnati Insurance Co.,* 178 F.3d 943 (7th Cir. 1999),** the Court of Appeals for the Seventh Circuit stated,

It is true that pretrial discovery, unlike the trial itself, is usually conducted in private. But...the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding. That interest does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interest predominate in the particular case, that is, only if there is good cause for sealing a part or whole of the record in that case.

***Citizens First National Bank,* 178 F.3d at 944-45 (internal citations omitted).**

Although judicial proceedings are public rather than private property and court records and decisions are to be as open as possible, the Court finds that, in this instance, plaintiff and defendants have shown good cause for the entry of a Protective Order. The category of documents protected is sufficiently narrow and said documents are statutorily

protected from disclosure. Accordingly, the Court being fully advised in the premises,

IT IS THE ORDER of this COURT that plaintiff's, Robbyn Brown's, Motion for Protective Order (Doc. 46) be GRANTED. The Court hereby adopts and enters Protective Order submitted by defendants.

IT IS SO ORDERED.
Dated this 10th day of January, 2001.

/s/ Gerald B. Cohn
**GERALD B. COHN**
**UNITED STATES MAGISTRATE JUDGE**

[Doc. 52]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. JOHN W. SNOW, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

CASE NO. 99-745-DRH

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DISCOVERY

(Filed February 06, 2001)

On September 30, 1999, Plaintiff Robbyn Brown, *pro se*, an employee of the Internal Revenue Service ("IRS"), filed a fourteen-count complaint against Lawrence H. Summers, Secretary of the Treasury; Dorian Morley, Director, Regional Complaints Center; Deloris Featherstone; and Kathleen Swain, et al. In Counts I through V, and Counts IX and XI, Plaintiff maintains that the IRS discriminated against her on the basis of her race and gender. In Counts VI, VII, and X, Plaintiff maintains that the IRS retaliated against her for having exercised her federally protected rights under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et. seq., and The Civil Rights Act of 1991, 42 USC § 1981a. In Count VIII, Plaintiff maintains that Defendants Featherstone and Swain conspired to deny her due process and equal protection under the laws in violation of 42 USC §§ 1981, 1983, and 1985. In Counts XII and XIII, Plaintiff maintained that Defendants violated the Freedom of Information Act, 5 U.S.C, § 552 et seq., ("FOIA") and the Privacy Act, 5 U.S.C. § 552a et. seq. by disclosing the contents of Brown's discrimination action and stating false information to her colleagues. In Count XIV,

Plaintiff maintains that Defendant Morley violated and abused her delegated duty under 29 C.F.R. 1614 in the processing of Plaintiff's complaints by improperly denying Plaintiff the full and equal benefit of all laws and proceedings as provided by 42 U.S.C. 1981 and rights and privileges expressed in 42 U.S.C. § 1983.

After having previously served Defendants with her Initial Disclosures, Plaintiff served Defendants a forty-four item Discovery Request on March 16, 2000 (Plaintiff's Exhibit A). According to AUSA Llewellyn, the discovery request was received on March 20, 2000.

On April 27, 2000, prior to the commencement of the Scheduling and Discovery Conference before Honorable Judge Gerald B. Cohn, AUSA Llewellyn passed Plaintiff the Defendants' Initial Disclosures and three (3) items from the March 16, 2000 Discovery Request.

During the Scheduling and Discovery Conference held in Judge Cohn's chambers, AUSA Llewellyn requested an extension of the 30-day time period for responding to Plaintiff's discovery request. This time for responding had already expired. AUSA Llewellyn stated he needed additional time to respond due to some of the information needing to be redacted to remove identifying information.

AUSA Llewellyn had previously advised Plaintiff that attorneys for the IRS were gathering the information. Plaintiff had refused AUSA Llewellyn's request for an extension on the grounds that the IRS had purportedly done an investigation of most of the matters doing the administrative processing of the complaints over a 3-year period. Therefore, most of the information sought should have been readily available or easily retrieved. Plaintiff having been in the latter stages of her pregnancy, needed the

information to adequately prepare the case prior to going on maternity leave.

On May 26, 2000, AUSA Llewellyn mailed Plaintiff two additional items from the March 16, 2000 Discovery Request, in excess of sixty days after the request was served. (Plaintiff's Exhibit B)

On July 31, 2000 at approximately 02:45 p.m., Plaintiff (while on maternity leave) and AUSA Nicholas Llewellyn held a telephone conference to discuss Plaintiff's March 16, 2000 discovery request pursuant to Local Rule 37.1 of the Federal Rules of Civ. Proc. Plaintiff and AUSA Llewellyn went over the first twenty-five items. Objections to the remaining items were similar to the objections Plaintiff and AUSA Llewellyn had previously discussed. AUSA was to confer with IRS Counsel to determine what items they would be releasing. To date, no additional information has been provided.

On October 03 – 04, 2000, during AUSA Llewellyn's taking of Plaintiff's deposition, Plaintiff again inquired as to the status of the information requested.

By letter dated November 13, 2000 served on Defendants' Counsel, Plaintiff attempted to schedule dates to depose Defendants prior to the December 01, 2000 deadline approved by this Court. (Plaintiff's Exhibit C). Plaintiff spoke with AUSA Llewellyn later that evening and was provided his dates of availability subject to IRS Counsel's availability. Plaintiff mailed AUSA Llewellyn a letter on November 14, 2000 confirming this conversation and expressing concern about meeting the December 01, 2000 deadline given their limited availability. (Plaintiff's Exhibit D).

On November 17, 2000 Plaintiff deposed two non-party witnesses. At the conclusion of the last deposition, Plaintiff again inquired as to the status of additional documents to be provided.

On November 29, 2000, Plaintiff served Defendants a second Discovery Request for records, to which AUSA Llewellyn responded on January 02, 2001 (Plaintiff's Exhibits E and F).

On January 10, 2001, this Court granted Plaintiff's request for a Protective Order for statutorily protected information (Doc. 52). The Protective Order (Doc. 56) allows Defendants to release information that is protected by the Privacy Act and/or Title 26. In response to same, Plaintiff phoned AUSA Llewellyn on January 17, 2001 to inquire as to what additional information would be provided and when. AUSA Llewellyn suggested Plaintiff make her request in writing. Viewing this as another by Defendants to stonewall, Plaintiff declined.

AUSA Llewellyn advised Plaintiff by letter dated January 24, 2001 that Defendants will not be made available for depositions nor would any records be provided absent a Court Order (Plaintiff's Exhibit G). This is contrary to his earlier statement that Defendants would be available for deposing during the week of January 30, 2001. This also defies the Protective Order previously issued by this Court.

AUSA Llewellyn in response to Plaintiff's Discovery Requests raised the following objections:

1. The request seeks documents subject to the Privacy Act, 5 U. S. C. § 552a, which may not be produced in the absence of an authorization from the person to whom the records pertain or a court order or an Agreed Motion for

Protective Order.

2. Most of the requested documents would contain taxpayer information that is protected from disclosure by 26 U. S. C. § 6103.

3. The request is overly broad as it seeks information for employees other than grade 12 revenue agents.

4. To the extent the request encompasses employees other than grade 12 revenue agents, it seeks documents which are neither relevant in themselves nor reasonably calculated to lead to the discovery of admissible evidence.

5. To the extent the information could be retrieved electronically, the request is overly burdensome. The database on which the IRS maintains the requested information only contains the requested information on cases that are open or which have been closed within the last 400 days; after that time, the information is archived into files which are saved on tapes in Houston. In order to query the requested information, all the data from the tapes would have to be restored and then queried. This would be a very time-consuming undertaking, and it is not even certain when or if appropriate hardware would be available for doing so. Alternatively, to answer this request without using the database would require reviewing independently each of the case records for hundreds or thousands of cases.

6. All responsive documents have been purged in the ordinary course of business pursuant to IRS policies and procedures for the retention and destruction of documents.

## DISCUSSION

The Equal Employment Opportunity Commission is authorized to issue rules, regulations, orders, and instructions pursuant to section 717(b) of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 2000e-16(b). Pursuant to that authority, the EEOC issues its Management Directive. EEOC Management Directive 110 (MD – 110) states that the purpose of the Directive is to provide federal agencies with Commission policies, procedures, and guidance relating to the processing of employment discrimination complaints governed by the Commission's regulations in 29 C.F.R. Part 1614. In its address to the heads of federal agencies, MD-110 states, "Since the commission's guidance is binding in nature, federal agencies are required to comply with it".

Section 1614.108(b), of Title 29 C.F.R., requires that "the agency shall develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint." An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.

Section VI-D of Chapter 6 of the MD-110 provides that the investigator must be thorough. Further, the Investigator must identify and obtain all relevant evidence from all sources regardless of how it may affect the outcome. Section VII-C(4) of Chapter 6 of the MD-110 provides that all relevant documents must be obtained. [Emphasis added]

With respect to Defendants' objections 1 and 2, these are moot in that this Court has entered a Protective Order that would allow their release.

With respect to Defendants' objection 3, Section VII-B(1) of EEOC MD 110 Chapter 6 provides that comparative

evidence must be sought in every case alleging disparity in treatment on a basis protected by a law enforced by the EEOC. It states:

In general, similarly situated means that the persons who are being compared are so situated that it is reasonable to expect that they would receive the same treatment as the complainant in the context of a particular employment decision. It is important to remember that individuals may be similarly situated for one employment decision, but not for another. For example, a female GS-4 clerk-typist may be similarly situated to a male GS-7 paralegal in a discrimination case involving the approval of annual leave where the same rules are applied to both by the same supervisor or where both are in the same unit or subject to the same chain of command. The investigator would be obligated to find out whether there were persons, not named by the complainant but similarly situated, whose treatment could be compared to the complainant's treatment.

Accordingly, the nexus for retaliation is whether Defendants treated Plaintiff differently from other employees who had not previously filed EEO complaints.

With respect to Defendants' objection 4, Plaintiff previously set out the relevance and necessity of the information sought during the administrative processing of the case. (Plaintiff's Exhibit H)

With respect to Defendants' objections 5 and 6, Plaintiff responds that she requested most of this information during the administrative processing of this case. During that time, she also expressed her concerns about the information being purged or destroyed. (Plaintiff's Exhibit H) Although complying with the discovery request may be

burdensome, the information's relevancy and utility to the Plaintiff outweighs the burden to the defendant. Burns v. Thiokol chem. Corp. 483 F. 2d 300, 306 (5th Cir. 1973). In the event the records are no longer available, Plaintiff requests this Court invoke 29 C.F.R. 1614.108(c)(3) which provides that the decisionmaker should in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party, etc.

WHEREFORE, for the above stated reasons Plaintiff pray this Court grants her motion and directs Defendants to produce the records requested within ten (10) days from the date of the Order and make known, available dates for the taking of their depositions.

Prayerfully submitted,
BY: /s/ Robbyn Brown

Robbyn Brown, Plaintiff
P.O. Box 0034
O'Fallon, Illinois 62269-0034
W: (618) 632-5691

[Doc. 74]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. Lawrence H. Summers, et al, Defendant
CASE NO. 99-745-DRH

ORDER

(Filed February 28, 2001)

Before the Court is Plaintiff's Motion to Compel Discovery (Doc. 68), filed February 6, 2001. Plaintiff, Robbyn Brown ("Brown") moves the Court to enter an Order compelling defendants to produce documents requested in her Discovery Requests of March 15, 2000, and November 20, 2000, and to be available for plaintiff to take their depositions.

In support of her Motion, Brown states that she has not been allowed to depose defendants pursuant to her November 13, 2000, request. She further states that defendant has refused to release certain information to corroborate her Complaint.

Defendants respond that any delay in the discovery process regarding depositions was caused by plaintiff's own inaction. Plaintiff took three depositions on November 17 and 20, 2000, and did not request the deposition of another specific individual until January 17, 2001. The discovery deadline in this matter was December 29, 2000, and continuances have been denied. Regarding written discovery, defendants state that defendants' counsel held a lengthy telephone conversation with Brown which covered twenty-five of Brown's forty-four requests. The conversation ended in defendants' counsel advising Brown

that he would need to review Brown's position with IRS counsel and with Brown advising that she would submit her position in writing. Defendants state that Brown failed to set out her specific dispute with any discovery request and seeks relief on the basis that defendants have stonewalled on discovery.

It is well-established that the court has broad discretion in the conduct of pre-trial discovery procedures. Court-ordered discovery deadlines cannot be ignored with impunity. Discovery in this matter was to have been completed by December 29, 2000. The Court has twice granted motions for continuances in the deadline for deposition of the parties, eventually extending said deadline four months. Brown fails to provide any reason, much less good cause, for her failure to seek defendants' depositions prior to the discovery cut-off. Further, she provides no reason for her failure to follow through on disputes regarding written discovery as required by **Fed. R. Civ. P. 37** and **Local Rule 37.1**. The parties have had more than adequate time to conduct thorough discovery. The Court has denied further continuances and will not further extend discovery. Accordingly, the Court being fully advised in the premises,

IT IS THE ORDER of this COURT that Plaintiff's Motion to Compel Discovery (Doc. 68) be DENIED.

IT IS SO ORDERED.
Dated this 27th day of February, 2001.

/s/ Gerald B. Cohn
**GERALD B. COHN**
**UNITED STATES MAGISTRATE JUDGE**

[Doc. 82]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. JOHN W. SNOW, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

CASE NO. 99-745-DRH
(Filed 03/20/2001)

OBJECTION TO DENIAL OF MOTION TO COMPEL DISCOVERY AND REQUEST FOR RECONSIDERATION

COMES NOW, Plaintiff Robbyn Brown, Pro Se, pursuant to Fed. R. Civ. P. 72(a), respectfully requesting reconsideration and modification of Magistrate Judge Cohn's Order entered February 28, 2001 denying my Motion to Compel Discovery. In support of such, I state as follows:

1. I'm filing this request within the extended time period graciously afforded by the Court.

2. I have worked diligently on this case as corroborated by the attached timeline (Plaintiff's Exhibit A) and have not lacked initiative as stated by Defendants in their Opposition to Plaintiff's Motion to Compel Discovery.[1]

3. I have not had adequate time within which to depose Defendants or non-party witnesses due to maternity leave and variables outside of my control (i.e. health reasons and Defendant's Counsel unavailability and refusal to extend the deadline for doing so accordingly).

4. This Court granted my Motion for a Protective Order in order to facilitate Defendants' release of protected information. However, AUSA Llewellyn in Defendants' Opposition to Plaintiff's Motion to Stay Proceedings, states "Plaintiff is not entitled to continue to pursue depositions or documents". He has thereby made the Court's Protective Order, (which requested before the discovery deadline but not issued until after the discovery deadline), moot.

5. I would be unduly prejudiced without the opportunity to depose Defendants and potential non-party witnesses to refute the Defendants' testimony.

6. The denial of my Motion to Compel Discovery places an unduly harsh result upon me thereby in effect precluding full consideration of the merits of my case.

7. My Memorandum of Law in support of my Objection to Denial of Motion to Compel Discovery and Request for Reconsideration is attached.

Wherefore, I respectfully request reconsideration and modification of the Order signed by Judge Cohn denying her Motion to Compel Discovery.[2]

Prayerfully submitted,
BY: /s/ Robbyn Brown
Robbyn Brown, Plaintiff
P.O. Box 0034
O'Fallon, Illinois 62269-0034
W: (618) 632-5691

BROWN v. SUMMERS, et al.
99-745-DRH

| DATE | ACTION TAKEN |
|---|---|
| September 30, 1999 | Complaint filed. |
| January 18, 2000 | Partial answer by Defendant Summers. |
| February 22, 2000 | Approved Scheduling and Discovery Order |
| March 06, 2000 | Plaintiff served Defendant her Initial Disclosures |
| March 16, 2000 | Plaintiff served Defendant a Discovery Request |
| April 27, 2000 | Hearing on scheduling conference. Defendant provides Plaintiff with its Initial Disclosures and three items from the March 16, 2000 Discovery Request.<br><br>Defendants are granted 30 additional days to respond to the Discovery Request. |
| May 26, 2000 | Defendants file Answer to Counts VIII, IX, XII, XIII, and XIV. |

| | |
|---|---|
| May 30, 2000 | One additional item received from Defendants in response to Plaintiff's March 16, 2000 Discovery Request. |

[PLAINTIFF'S ATTACHMENT – A1]

| | |
|---|---|
| May 31, 2000 | Defendant filed Motion to Modify Approved Scheduling and Discovery Order requesting Plaintiff's deposition deadline be extended to October 01, 2000. |
| June 02, 2000 - October 16, 2000 | Plaintiff goes on maternity leave. |
| July 28, 2000 | Plaintiff and AUSA Llewellyn hold telephone conference to go over Discovery Request. AUSA Llewellyn stated he would discuss with IRS Counsel and get back with Plaintiff as to any additional information that would be forthcoming. |
| October 01, 2000 | Deadline for Plaintiff's deposition. |
| October 03 - 04, October 04, 2000 | Plaintiff deposed by AUSA Llewellyn. |
| November 13, 2000 | Plaintiff sends AUSA letter requesting available dates for deposing Defendants. (Exhibit B) |
| November 14, 2000 | AUSA Llewellyn and Plaintiff discuss his available dates for deposing |

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| | Defendants. The dates are contingent upon the availability of IRS Counsel. Plaintiff sends AUSA Llewellyn a letter confirming this conversation. (Exhibit C) |
| November 17, 2000 | Plaintiff deposed two non-party witnesses with AUSA Llewellyn and IRS Counsel, Dee Jarrett Dow present. Ms. Dow states she is unavailable the week of November 27, 2000 due to family matters. |

[PLAINTIFF'S ATTACHMENT – A2]

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| November 20, 2000 | Plaintiff deposed one non-party witness with AUSA Llewellyn present and Ms. Dow participating via speakerphone.<br><br>AUSA Llewellyn refuses to extend the December 01, 2000 deadline unless Plaintiff agrees to limit the number of depositions. Plaintiff refuses pursuant to Local Rule 30.1. |
| November 21, 2000 | AUSA Llewellyn is not available as previously stated. |
| November 22, 2000 | AUSA Llewellyn is not available as previously stated. |
| November 23, 2000 | Thanksgiving |
| November 24, 2000 | AUSA Llewellyn is not available as |

previously stated.

November 27, 2000 — AUSA Llewellyn is available but Ms. Dow is not as previously stated.

Plaintiff files a Motion to Modify the Approved/Scheduling Discovery Order due to AUSA Llewellyn's refusal to extend the date by the Court's December 01, 2000 deadline.

November 28, 2000 — AUSA Llewellyn is available but Ms. Dow is not as previously stated.

Plaintiff files a Motion for a Protective Order to facilitate Defendants' release of protected information.

[PLAINTIFF'S ATTACHMENT – A3]

November 29, 2000 — Neither AUSA Llewellyn nor Ms. Dow is available as previously stated.

November 30, 2000 — Neither AUSA Llewellyn nor Ms. Dow is available as previously stated.

December 01, 2000 — Neither AUSA Llewellyn nor Ms. Dow is available as previously stated.

December 07, 2000 — AUSA Llewellyn files Defendants' Response to Plaintiff's ("Second") Motion to Modify Approved Scheduling and Discovery Order. In paragraph 3 of his motion, AUSA Llewellyn expresses concern about any

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| | depositions being taken before December 31, 2000 due to potential "use or lose" annual leave some employees may have had. |
| December 14, 2000 | Plaintiff files Motion Seeking Leave to Amend Motion to Modify Approved Scheduling and Discovery Order to request a change in the language of the proposed order. In paragraph 1 in support thereof, she stated AUSA Llewellyn had not contacted her to date with available dates for deposing the Defendants. |
| January 10, 2001 | Court grants Plaintiff's Motion for Protective Order. [Doc. 85] |

[PLAINTIFF'S ATTACHMENT – A4]

[Doc. 85]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. JOHN W. SNOW, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

CASE NO. 99-745-DRH
(Filed 03/20/2001)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S OBJECTION TO DENIAL OF MOTION TO COMPEL DISCOVERY AND REQUEST FOR RECONSIDERATION

COMES NOW, Plaintiff Robbyn Brown, Pro Se, pursuant to Fed. R. Civ. P. 72(a), respectfully requesting reconsideration and modification of Magistrate Judge Cohn's Order entered February 27, 2001 denying my Motion to Compel Discovery. In support of such, I state as follows:

March 16, 2000 Discovery Request

On March 16, 2000 I served AUSA Llewellyn with a 44-item request for records. Upon extension by the Court, AUSA Llewellyn responded on May 26, 2000. The response was not received until a few days before I went into labor. While on maternity leave, I discussed at least twenty-five of the items requested with Mr. Llewellyn for which Mr. Llewellyn stated he would confer with IRS [1] Counsel Denise Jarrett Dow. A dispute exists as to whether I was to provide a response to the remaining items before or after he had conferred with IRS Counsel. I maintain he was to have provided a response from Counsel prior to my addressing the other items. He maintains I was to have provided a response

prior to his conferring with IRS Counsel. (Government Exhibit AA – Deposition of Robbyn Brown, pages 266-268). Whereby I agreed to limit my request to the years 1993 and forward with stipulations attached, (the 1995 evaluation covered the period March 1, 1994 – March 31, 1995), no other accord could be reached.

Request to AUSA Llewellyn to Depose Defendants

At the conclusion of the deposition of two non-party witnesses on November 17, 2000, AUSA Llewellyn, IRS Counsel Denise Jarrett Dow and I discussed their availability and the Defendants availability for the taking of Defendants' depositions. Ms. Dow stated that as Counsel for the IRS, she would have to be present when the Defendants were deposed. Due to family arrangements she could not be present the weeks of November 20, 2000 and November 27, 2000. When I refused to agree to AUSA Llewellyn's request to limit the number of depositions I planned to take to ten, he refused to agree to extend the December 01, 2000 deadline date for deposing the Defendants. This was despite the fact that I was available at the time.

November 29, 2000 Discovery Request

The November 29, 2000 Discovery Request was faxed to AUSA Llewellyn to allow the 30-day response time before the discovery deadline. . To facilitate the Defendants' release of statutorily protected information, a Motion for Protective Order was filed simultaneously. AUSA Llewellyn [2] responded via mail on January 02, 2001. The Discovery Request listed 15 items. For each of the first 14 items sought, AUSA Llewellyn cited the Privacy Act protection. In that a Motion for a Protective Order was pending, there was no need to contact AUSA Llewellyn.
The first 6 items consisted of requests for back-up tapes for

all VMS and/or e-mail messages for individuals named in the Complaint, to which Defendants suggested none existed. Defendants provided a web address for the seventh item. Item 8 consisted of a request for employee work folders for the named Defendants, some similarly situated employees, and potential witnesses. Items 9 and 10 requested the performance evaluations for Defendants Swain and Featherstone. In his response to items 9 and 10, AUSA Llewellyn stated specifically "Defendant avers that upon entry of a Protective Order, Defendant will produce the requested performance appraisals for the years stated if they are available back to 1995". Item 11 was a request for the performance appraisals for Defendant Dorian Morley. Items 12 – 13 were requests for information concerning the Regional Complaints Center. Item 14 was provided. Item 15 was a request for information for a similarly situated employee.

On January 10, 2001, this Court granted my Motion for a Protective Order. (Doc. 52). After allowing Defendants adequate time within which to provide the information (i.e., information for which their only objection was based upon statutory protection), I phoned AUSA Llewellyn to inquire as to what information would be provided and when. He suggested I put my request in writing. The Discovery Request having previously been sent to him in writing, I felt his request was burdensome and an attempt to delay the release of the information. Even though my motion to extend the deadline date for deposing the Defendants was pending, I took the opportunity during this telephone conversation to inquire if he would be making the Defendants available for [3] deposing. He stated he would and provided a time period for doing so. He withdrew that offer a week later prior to arrangements being finalized.

Discussion

The facts in this case are similar to the facts in Geschke v. CLDC Management Corporation, 956 F. 2d 272 (7th Cir. 1992). The Geshckes were pro se plaintiffs that had filed a motion to compel discovery after the discovery deadline had closed. The district court denied their motion to compel. The Seventh Circuit Court of Appeals found that the district court abused its discretion with respect to the discovery matters.

In Del Carmen v. Emerson Electric Co., 908 F. 2d 158, 161 (7th Cir. 1990), the Court found that the district court abused its discretion in dismissing the plaintiff's case. It stated that a dismissal with prejudice is a harsh sanction which should usually be employed only in extreme situations, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing.'"

Unless there is a clear record of delay or contumacious conduct or unless less drastic sanctions have proven unavailing, the policy favoring determination of cases on their merits outweighs the district court's understandable concern for clearing its docket.). Lowe v. City of East Chicago, 897 F. 2d 272, 274-275 (7th Cir. 1990). [4]

Wherefore, I respectfully request reconsideration and modification of the Order signed by Judge Cohn denying her Motion to Compel Discovery.

Prayerfully submitted,
BY: /s/ Robbyn Brown
Robbyn Brown, Plaintiff
P.O. Box 0034
O'Fallon, Illinois 62269-0034
W: (618) 632-5691

[Doc. 86]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. JOHN W. SNOW, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

CASE NO. 99-745-DRH
(Filed 11/28/2000)

PLAINTIFF'S MOTION TO MODIFY APPROVED SCHEDULING AND DISCOVERY ORDER

COMES NOW Plaintiff, Robbyn Brown, *Pro Se*, respectfully requesting modification of the amended Approved Scheduling and Discovery Order entered August 22, 2000, with respect to the Scheduling Plan, paragraphs 3 and 7, which now requires "3. Defendants' depositions shall be taken by December 1, 2000. 7. Discovery must be completed by December 29, 2000." Plaintiff respectfully requests the Court to expand said date of depositions to January 05, 2001 and to expand the Discovery completion date to March 06, 2001. In support thereof, Plaintiff states as follows:

1. The initial Scheduling Plan was agreed to on February 17, 2000 by Plaintiff and by Defendants' former counsel, William E. Coonan, Assistant United States Attorney (AUSA) for the Southern District of Illinois,[1] whose Motion for Leave to Withdraw was granted by the Court on May 4, 2000.

[1] AUSA William Coonan's Motion for Leave to Withdraw was approved by this Court on May 04, 2000 after AUSA Nicholas Llewellyn had entered his appearance on behalf of Defendants.

2. By Order of this Court dated June 19, 2000, the initial Scheduling and Discovery Plan deposition dates were expanded upon motion by Defendants.

3. Plaintiff previously requested and received by Order of this Court expansion of the deposition dates due to Plaintiff having been on maternity leave.

4. The current Scheduling and Discovery Order as Amended provides that Defendants' depositions are to be completed no later than December 01, 2000.

5. Plaintiff by letter dated November 13, 2000 served on Defendants' Counsel has attempted to schedule dates to depose Defendants.

6. According to AUSA Nicholas Llewellyn and IRS Counsel, due to scheduling conflicts Defendants' depositions cannot be taken by the December 01, 2000 deadline.

7. During Plaintiff's deposing of a non-party witness on November 17, 2000, AUSA Nicholas Llewellyn agreed to expand the December 01, 2000 date provided Plaintiff agrees to limit her total depositions to no more than ten, to which Plaintiff refused.

8. Local Rule 30.1 of the Fed. R. of Civil Proc. states that this Court has opted out of Federal Rule of Civil Proc. 30(a)(2)(A). It states specifically, "In this District, there are no restrictions placed on the number or length of depositions unless ordered by the Court."

9. Upon deposing defendants, Plaintiff requires additional time in which to discover additional information that may be reasonably calculated to lead to the discovery of

admissible evidence.

10. Defendant will not be prejudiced by the expanded dates.

WHEREFORE for the above stated reasons, Plaintiff respectfully requests the Court grant Plaintiff's Motion.

Prayerfully submitted,
BY: /s/ Robbyn Brown

Robbyn Brown, Plaintiff
P.O. Box 0034
O'Fallon, Illinois 62269-0034
W: (618) 632-5691

[Doc. 45]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff, vs. LAWRENCE H. SUMMERS, et al, Defendants.

CASE NO. 99-745-DRH

(Filed 01/17/2001)

**ORDER**

Before the Court is Plaintiff's Motion to Modify Approved Scheduling and Discovery Order (Doc. 45), filed November 28, 2000. Plaintiff moves the Court to extend the current scheduling order approximately sixty (60) days. The Court is unwilling to continue this matter. Accordingly, the Court being fully advised in the premises,

IT IS THE ORDER of this COURT that Plaintiff's Motion to Modify Approved Scheduling and Discovery Order (Doc. 45) be DENIED. The parties are reminded that a settlement conference is set in this matter for January 23, 2001, at 1:30 P. M. and that settlement statements are now due.

IT IS SO ORDERED.
Dated this 17th day of January, 2001.

/s/ Gerald B. Cohn
**GERALD B. COHN**
**UNITED STATES MAGISTRATE JUDGE**

[Doc. 55]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. LAWRENCE H. SUMMERS, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

No. 99-CV-0745-DRH

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF RECOVERY OF COSTS AGAINST DEFENDANT KATHLEEN SWAIN FOR FAILURE TO WAIVE SERVICE OF SUMMONS

COMES NOW Plaintiff, Robbyn Brown, Pro Se, with her Reply Brief in support of her Motion for Recovery of Costs Against Defendant Kathleen Swain for Failure to Waive Summons pursuant to Rule 4(d)(5) of the Federal Rules of Civil Procedure. Whereby Reply Briefs are not favored, Plaintiff respectfully requests leave of this Court in these exceptional circumstances in responding to Defendant's Opposition.

Rule 4(d) of the Federal Rules of Civil Procedure provides-

> "If a defendant located within the United States fails to comply with a request for Waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown."

AUSA Nicholas Llewellyn in his opposition to

Plaintiff's Motion for Recovery of Costs, states as follows:

1. Defendant Swain informed him she never received the Waiver of Service,
2. Plaintiff cannot provide any evidence that Defendant Swain actually received the Waiver, and
3. Defendant Swain was not properly served.

All of the above are without merit.

A. Defendant Swain's Denial As To Her Receipt of the Waiver of Service

Plaintiff mailed postage paid, the Waiver of Summons (hereinafter referred to as Waiver) to Defendant Swain at her last known address, 15 Burcham Drive, Fairview Heights, IL 62208 via both certified mail and first-class mail. As late as September 21, 1999, Defendant Swain maintained this as her address. (Plaintiff's Exhibit-A attached, copy of envelope addressed by Defendant Swain). The Waiver sent via first-class mail was never returned. Several attempts were made by the Fairview Heights Post Office to deliver the Waiver sent via certified mail. The Post Office returned the certified mail stamped "Unclaimed" as opposed to "Wrong Addressee" or "Attempted Not Known". (Plaintiff's Exhibit – B attached, copy of front and back of certified mail which was returned).

AUSA Nicholas Llewellyn states in Defendant's opposition to Plaintiff's motion for recovery of costs that Defendant Swain [currently] lives in Missouri. He does not deny nor can he that Defendant Swain lived at or maintained the Fairview Heights address as her address of record at the time the Waiver was sent.

On February 17, 2000, during discussions with AUSA William E. Coonan[2] regarding the Joint Report of Parties and Proposed Scheduling and Discovery Order, Plaintiff advised Mr. Coonan that Defendants Morley and Featherstone had returned their Waivers of Service, but Defendant Swain had not. Mr. Coonan stated Plaintiff then would have to formally serve Defendant Swain and inquired if Plaintiff intended to serve Defendant Swain at her place of business. This conversation took place approximately two weeks before the deadline for returning the Waivers, more than enough time for Defendant Swain to have returned the Waiver.

Service under Rule 4(e) of the Federal Rules of Civil Procedure does not appear to allow service upon Defendants in their individual capacities to be made at their place of business. Accordingly on March 16, 2000, Plaintiff served Defendants a Discovery Request in which she requested in addition to other items, Defendant Swain's home address. To date, Defendants have refused to provide that information along with substantially all of the other information requested.

As to Defendant Swain's submission of an affidavit attesting to her not having received the Waiver, Plaintiff respectfully directs the Court's attention to Count VIII, Paragraph 8(b) of Plaintiff's Complaint that maintains Defendant Swain submitted false affidavits during the administrative processing of Plaintiff's case. In her initial affidavit dated June 26, 1997, Defendant Swain maintained she did not have knowledge of Plaintiff's EEO Complaint until July, 1996, (i.e. after Plaintiff's 1996 evaluation was prepared). In this affidavit, she also specifically lined out the

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[2] By order dated May 04, 2000, this Court granted AUSA William E. Coonan's motion to withdraw (Doc. No. 30)

"penalties of perjury" statement. In a subsequent affidavit submitted over one year later, Defendant Swain maintains she had knowledge of Plaintiff's EEO complaint as early as "May or June 1996" (i.e. prior to Plaintiff's 1996 evaluation having been prepared). The front and last pages of those conflicting affidavits are attached. (Plaintiff's Exhibit-C).

B. Defendant's Assertion That Plaintiff Cannot Provide Any Evidence That Defendant Swain Actually Received the Waiver

In response to Defendant's assertion that Plaintiff does not have any evidence that Defendant Swain actually received the Waiver, Plaintiff states that this defense was foreseen. Accordingly, she incurred the extra expense and duplication of effort of sending the Waiver postage paid by both first-class mail and certified mail to each of the Defendants in their individual capacities. The purpose of the delivery by first-class mail was to ensure Defendant Swain's receipt of the Waiver in the event she refused or intentionally did not claim the certified mail, which was the latter. Secondly, Rule 4(d)(2)(B) of the Federal Rules of Civil Procedure does not require Plaintiff to "provide evidence" that Defendant Swain actually received the Waiver; it states that the Waiver "shall be dispatched through first-class mail or other reliable means". Service via first-class mail does not provide the sender with proof of receipt. Certified mail usually does, when claimed.

C. Defendant Swain's Assertion That She Was Not Properly Served

In response to the assertion that Defendant Swain was not properly served, Plaintiff cites Rule 12(b) of the Federal Rules of Civil Procedure which provide that said defense should have been made in the responsive pleading. In his

Answer to Plaintiff's Complaint (Doc. No. 32), AUSA did not raise improper service as a defense. This defense is nevertheless moot in that although the St. Clair County Sheriff's Department stated in its Affidavit of Service that the documents were left with a person residing therein, it also followed up the hand-delivery by mailing a copy of the summons and the complaint to Defendant Swain. To date, these were also not returned. The St. Clair County Sheriff's Department's Affidavit of Service was previously filed with this Court.

Of particular note, Defendant Swain would have this Court believe she did not receive, nor was she aware of either of the Waivers sent. However, she did receive or was aware of the service made by the St. Clair County Sheriff's Department as evidenced by AUSA Llewellyn's assertion that the service by the Sheriff's Department was made upon her father. The Affidavit of Service does not state the recipient was Defendant Swain's father. Defendant Swain ostensibly, provided this information.

Wherefore, Plaintiff respectfully requests the Court grant her recovery of costs subsequently incurred in serving the summons upon Defendant Kathleen Swain pursuant to Rule 4(d)(5) of the Federal Rules of Civil Procedure.

Prayerfully submitted,
BY: /s/ Robbyn Brown
Robbyn Brown, Plaintiff
P.O. Box 0034
O'Fallon, Illinois 62269-0034
W: (618) 632-5691

[Doc. 41]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. LAWRENCE H. SUMMERS, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

No. 99-CV-0745-DRH

MEMORANDUM AND ORDER

(Filed 10/19/2000)

Herndon, District Judge:

Now before the Court is Brown's motion for recovery of costs against Defendant Kathleen Swain for failure to waive service of summons (Doc. 35). Specifically, Brown argues that pursuant to Federal **Rule of Civil Procedure** 4(d)(5), she is entitled to recover costs for Swain's failure to waive service. Swain responds that she has not received a request for waiver. Based on the following, the Court denies Brown's motion.

Brown moves, pursuant to **Fed.R.Civ.P.** 4(d)(5), to recover her costs incurred as a result of Swain's failure to waive service of summons. **Rule 4(d)** permits a plaintiff to avoid the costs of personal service by providing a defendant with written notice, through first-class mail or other reliable means, of the commencement of an action and with a request that defendant waive service of summons A defendant once notified "has a duty to avoid unnecessary costs of serving [1] the summons." **Fed.R.Civ.P, 4(d)(2).** The plaintiff "shall allow the defendant a reasonable time to return the waiver,

which shall be at least 30 days from the date on which the request is sent." **Fed.R.CIv.P.** 4(d)(2)(F). If the defendant does not comply with the waiver request, "the court shall impose costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown." **Fed.R.Civ.P. 4(d)(2)(G).**

Here the Court finds that Swain has shown good cause for failing to comply with the waiver request. First, Swain asserts (though an affidavit) that she never received a certified letter containing a request for waiver of service. Second, a copy of the certified letter that Brown sent to Swain reveals that the letter was returned as "unclaimed." Brown has not demonstrated that Swain actually received the request for waiver and that she intentionally ignored the request. Therefore, the Court will not assess costs against Swain. Accordingly, the Court DENIES Brown's request for recovery of costs against Defendant Kathleen Swain for failure to waive service of summons (Doc. 35).

**IT IS SO ORDERED.**

Signed this 19th day of October, 2000.

/s/ David R. Herndon
**DAVID R. HERNDON**
**United States District Judge**

[Doc. 43]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. PAUL H. O'NEILL[1], Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and
KATHLEEN SWAIN, Manager, Defendants.

No. 99-CV-0745-DRH

**MEMORANDUM AND ORDER**
(Filed July 11, 2001)

Herndon, District Judge:

I. Introduction and Procedural History

This matter comes before the Court on Defendants' motion to dismiss Counts VII and XIV and for partial summary judgment on Counts XII and XIII (Doc. 53) and Defendants' motion to dismiss Counts I, II and III and for partial summary judgment on Counts IV, VI and VII (Doc. 76). Based on the reasons stated herein, the Court grants Defendants' motions.

In September 1999, Robbyn Brown, an employee of the Internal Revenue Service ("IRS"), filed a fourteen-count *pro se* complaint against Lawrence H. Summers, Secretary of the Treasury, Dorian Morely, Director Regional Complaints Center, Deloris Featherstone, and Kathleen Swain (Doc. 1). Brown brings this suit pursuant to Title VII of the Civil Rights Act of 1964, **42U.S.C.§ 2000e *et seq.*, 42 U.S.C. § § 1981, 1981a, 1983** and **1985**, and violations of both the

Freedom of Information Act, **5 U.S.C. § 552**, and the Privacy Act, **5 U.S.C. § 552a**. In Counts I through VII and IX through XI, Brown alleges that Defendants discriminated against her on the basis of her race (African American) and her gender. In Count VIII, Brown alleges that Featherstone and Swain conspired to deny her due process and equal protection under the law in violation of **42 U.S.C. § § 1981,1983** and **1985**. In Counts XII and XIII, Brown alleges that Defendants violated the Freedom of Information Act, **5 U.S.C. § 552** ***et seq.***, and the Privacy Act, **5 U.S.C. § 552a** ***et seq.***, by disclosing the contents of Brown's discrimination action and stating false information to colleagues. Lastly in Count XIV, Brown alleges that Morely improperly rejected her administrative claims in violation of **42 U.S.C. § § 1981** and **1983**.

On April 11, 2000, the Court granted in part and denied in part Summer's motion to dismiss (Doc. 19). The Court dismissed with prejudice Brown's Freedom of information claims, and denied the motion as to the Privacy Act claims. Now before the Court are Defendants' motions to dismiss and for partial summary judgment.

It is significant to note that Brown is proceeding *pro se* herein. The pleadings of *prose* litigants should not be held to the same stringent standards as pleadings drafted by formally trained lawyers; instead they must be liberally construed. ***See Kyle II v. Patterson,* 196 F.3d 695, 697 (7tb Cir. 1999) (citing *Wilson V. Civil Town of Clayton, Ind.,* 839 F.2d 375, 378 (7th Cir. 1988) (pro se complaints/pleadings are to be liberally construed.)) *See also Cruz V. Beto,* 405 U.S. 319, 322 (1972).**[2]

## II. Facts[2]

[2] The facts are taken from Brown's complaint and the evidence submitted

Brown is a Certified Public Accountant who worked for the IRS at the Fairview Heights, Illinois office as an Internal Revenue Agent. Brown maintains that she was discriminated against because of her race and her gender. She claims that she realized that she was being discriminated against on or around May 7, 1996, when she learned that she did not get a promotion. She also alleges that on various occasions between 1994 and 1996 her former manager, Richard Knowles, allegedly did the following: (a) assigned selective return work assignments to other co-workers; (b) did not assist her with employee development; (3) issued her an evaluation for the period covering 3/2/94 through 3/1/95 that lacked uniformity and consistency; (4) publicly demeaned her; and (5) did not select her for the position of Internal Revenue Agent, GS-512-13 for Vacancy Announcement Number NPB 95-508MSL on or around May 8, 1996. Further, she contends that her other manager, Kathleen Swain, and Branch Chief, Deloris Featherstone, retaliated against her for contacting and engaging EEO counseling in May 1996. Specifically, she maintains that she was subjected to multiple workload/work in progress; she was subjected to 100% case file evaluations on closed cases; she was subjected to the imposition of work-related policies and procedures more harshly that other co-workers; she was denied acting manager assignments; and she was given an annual performance appraisal for the period covering 3/1/95 through 3/1/96. Brown also alleges that false and misleading testimony was used during her 1996 Evaluation.

Additionally, Brown alleges that Swain violated the Privacy Act by disclosing [3] portions of her EEO file without her consent to her co-workers Cheryl Pagan and

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by the parties. The allegations in Brown's complaint stem from actions that took place from 1994 to 1999, when she filed suit. The Court notes that almost all of the alleged instances in Brown's complaint do not contain specific dates.

Karen Hudgins. Lastly, she alleges that Morley denied her equal protection by "prematurely partially dismissing" her 1997 EEO complaint and refusing to investigate and dismissing her 1999 EEO complaint.

**Motion to Dismiss**

Federal notice pleading requires a plaintiff to set forth in his complaint "a short and plain statement... that will provide the defendant fair notice of the claim." ***Scott V. City of Chicago,* 195 F.3d *950,* 951 (7th Cir. 1999)(citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 1J.S. 163, 168 (1993))**. In deciding whether to grant a motion to dismiss for failure to state a claim under **FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6),** the court accepts as true all well-pled allegations and resolves in favor of the plaintiff all reasonable inferences. ***Marshall-Mosby V. Corporate Receivables, Inc.,* 205 F.3d 323, 326 (7th Cir. 2000). *See also Autry V. Northwest Premium Services, Inc.,* 144 F.3d 1037, 1039 (7th Cir. 1998)**. Dismissal under **Rule 12(b)(6)** is proper only if the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. ***Conley V. Gibson,* 355 U.S. 41, 45-46 (1957). *Accord Lifanda v. Elmhurst Dodge, Inc., 237* F.3d 803,806 (7th Cir. 2001); *Looper Maintenance Service, Inc. V. City of Indianapolis,* 197 F.3d 908, 911 (7th Cir. 1999).**

IV. Analysis

**A. Counts I, II and III**

O'Neill argues that Brown's claims of sex and race discrimination under Counts I, II and III are not timely because she had not contacted the IRS EEO counselor within 45 days of the alleged discriminatory conduct as required

under **29 U.S.C. § 1614.105(a)(1)**. Brown responds that her May 7, 1996 contact with the EEO counselor covers the prior acts of discrimination because she [4] was not aware nor could have reasonably known that Mr. Knowles intentionally discriminated against her and other females and minorities in rating performance evaluations, developmental assignments and return assignments. O'Neill replies that Brown is attempting to tie prior alleged acts of discrimination to her failure to promote claim under Count V. The Court agrees with O'Neill.

"Exhaustion of administrative remedies is a prerequisite for bringing an action under Title VII charging federal discrimination." ***Pack V. Marsh,* 986 F.2d *1155,* 1157 (7th Cir. 1993)**. An individual who believes that he or she has an employment discrimination claim against the United States Government must initiate contact with an employment counselor within 45 days of the alleged discriminatory action. **29 C.F.R. § 1614.105;**[3] ***See also Foster v. Bentsen,* 919 F. Supp. 293, 295 (N.D. 111.1996)**. This deadline is construed as a statute of limitations and not as a jurisdictional prerequisite. ***Johnson V. Runyon,* 47 F.3d 911, 917 (7th Cir. 1995)(citing Rennie V. *Garrett,* 896 F.2d 1057, 1062-63 (7th Cir. 1990))**. However, the 45-day time limit may be extended:

> when the individual shows that he or she was not notified of the time limits and was not otherwise

[3] 29 C. F.R. § 1614.105 provides in part that: "(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to tiling a complaint in order to try to informally resolve the matter. (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action."

> aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

**29 C.F.R. § 1614.105(a)(2).**

Here, Brown's initial contact with an EEO counselor for her first EFO complaint was [5] on May 7, 1996. Therefore, any action on any specific claims of employment discrimination that occurred before March 23, 1996 (45 days prior to contact with the EEO Counselor) are time barred. **29 C.F.R. § 1614.105**. Brown does not contest the fact that she never contacted an EEO Counselor concerning the race or sex discrimination that she allegedly suffered prior to that time. She maintains that her circumstances fall within the 45 day time limit extension based on the "continuing violation" doctrine because she was not aware of the race and sex discrimination until she was denied the promotion in May 1996.

"The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period." ***Selan V. Kiley,* 969 F.2d 560,564(7th Cir. 1992)**. Although there exist three viable forms of the continuing violation doctrine, Brown does not identify which one she relies upon to support her argument..[4]

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[4] There is some doubt over the propriety of applying the continuing violation doctrine where, as here, equitable tolling may be applied to a limitations period ***Moskowiitz v. Trustees of Perdue Univ., 5* F.3d 279, 282 (7th Cir. 1993)**. However, the doctrine continues to be applied. ***E.g., Koelscli v. Beltone Elecs.***

Presumably, Brown refers to the third form by arguing that the decision not to promote her was closely related to the other untimely acts. However, not only does Brown fail to show that the acts were closely related under the relevant factors, ***Selan*, 969 F.2d at 565**, she fails to meet the threshold circumstance for applying the third continuing violation theory: that the employer has *covertly* followed a practice of discrimination. ***Id.* at 565**. The Court finds that Brown relies on conclusory allegations, without supporting evidence, that she did not know that she was being intentionally discriminated because of her race and gender. Even if this Court were to find that the time limit should be extended in this case, it would be unreasonable to extend the time limit to encompass the two year time frame before Brown [6] applied for the promotion. Brown did not exercise due diligence in exploring her remedies for the discrimination she allegedly suffered. The Court concludes that Brown's circumstances do not fall within the time limit extension under **29 C.F.R. § 1614.105(a)(2)**. Therefore, Brown has not satisfied the statutory requirement of pursuing administrative remedies before filing a suit in federal court. Her failure to contact an FEO counselor clearly violates the 45-day time requirement. Accordingly, the Court **GRANTS *with prejudice*** O'Neill's motion to dismiss Counts I, II and III for failure to timely exhaust administrative remedies.

B. Counts VIII and XIV

In Count VIII Brown alleges that Featherstone and Swain conspired to deny her due process and equal protection in violation of **42 U.S.C. § § 1981, 1983 & 1985**. In Count XIV Brown alleges that Morley rejected her administrative claims in violation of **42 U.S.C. § § 1981 & 1983**.

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***Corp.*, *46* F.3d *705*, 707(7th Cir. 1995).**

Defendants argue that these counts must be dismissed because Title VII is the exclusive remedy for a federal employee alleging discriminatory employment practices. Brown argues that Defendants are equitably estopped from advancing this position. The Court agrees with Defendants.

Under Title VII it is clear that the head of the relevant federal department or agency is the only appropriate plaintiff in a Title VII action brought by a federal employee. **42 U.S.C. §2000e-16(c) (in an employment discrimination suit against the federal government, "the head of the department, agency or unit, as appropriate, shall he the defendant"); *see also Ellis v. United States Postal Dept.*, 784 F.2d 835,838 (7th Cir. 1986); *McGuinness V. United States Postal Service,* 744 F.2d 1318, 1322 (7th Cir. 1984).** Here, Secretary O'Neill is the head of the appropriate government department - - *i.e.,* the Department of Treasury - - of which the IRS is a part. Accordingly, the only appropriate Title VII defendant is Secretary O'Neill, in his official capacity. [7] Therefore, Brown fails to state a claim in any of the counts that allege violations of Title VII against Morley, Featherstone and Swain.

In fact, because Title VII is a federal employee's exclusive avenue for relief from allegedly discriminatory employment practices, Brown fails to state a claim against Morely, Featherstone and Swain under any legal theory. This issue was seuled when the Supreme Court held that a federal employee could not sue a governmental agency for employment discrimination under both Title VII and § 1981. ***See Brown* v. *General Services Admin., 425* U.S. 820,835(1976).** The Court reasoned that the statute's "carefu1 blend of administrative and judicial enforcement powers" shows Congress' intent that the statute provide the exclusive means of granting relief for federal employees against the

government. ***Brown,* 425 U.S. at 832-33; *Espinueva v. Garrett, 895* F.2d 1164, 1165 (7th Cir. 1990); *see also Ellis,* 784 F.2d at 838 (claims for relief under 42 U.S.C. § § 1981 & 1985 and Fifth Amendment dismissed).** Brown has not established by law or fact that any of the claims contained in Counts VIII and XIV are independent of her Title VII employment claims. Therefore, the Court concludes as a matter of law that Title VII provides for Brown's exclusive remedy and the Court **GRANTS *with prejudice*** Defendants Featherstone, Swain and Morley's motion to dismiss Counts VIII and XIV.

V. Summary Judgment

Summary judgment is proper where the pleadings and affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **FED. R. Civ. P.56(c); *Wyatt* V. *UNUM Life Insurance Company of America,* 223 F.3d 543, 545 (77th Cir. 2000); *Oates V. Discovery Zone,* 116 F.3d 1161, 1165 (7th Cir. 1997); *see also Celotex Corp. V. Catrett,* 477 U.S. 317, 322 (1986)).** The movant bears the burden of [8] establishing the absence of fact issues and entitlement to judgment as a matter of law. ***Wollin v. Gondert,* 192 F.3d 616,621-22 (7th Cir. 1999).** The Court must consider the entire record, drawing reasonable inferences and resolving factual disputes in favor of the non-movant. ***Schneiker v. Fords Insurance Co.,* 200 F.3d 1055, 1057 (7th Cir. 2000); *Baron V. City of Highland Park,* 195 1'.3d 333, 337-38 (7th Cir. 1999).**

In reviewing a summary judgment motion, the Court does not determine the truth of asserted matters, but rather decides whether there is a genuine factual issue for trial. ***EEOC V. Sears, Robuck & Co.,* 233 1'.3d 432, 436 (7th Cir. 2000).** No issue remains for trial "'unless there is sufficient

evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted...***Anderson V. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).** ***Accord Starzenski v. City of Elkhart*, 87 E.3d 872, 880 (7th Cir. 1996), cert. denied, 117 5. Ct. 683 (1997); *Tolle* v. *Carroll Touch, Inc.*, 23 F. 3d 174, 178 (7th Cir. 1994).**

This standard should be applied "with added rigor" in employment discrimination cases, in which intent and credibility are crucial issues ***Webb V. Clyde Choate Mental Health and Development Center*, 230 F.3d 991,997 (7th Cir. 2000); *Miller V. Borden, Inc.*, 168 F.3d 308,312 (7th Cir. 1999); *King V. Preferred Technical Group, Inc.*, 166 F.3d 887,890(7th Cir. 1999).** This standard reflects pronouncements that in employment discrimination cases, which often involve issues of motive and intent, summary judgment must be approached with caution. ***Huhn V. Koering Co.*, 718 F.2d 239, 242 (7th Cir. 1983) *Huhn*** relied on an earlier case which recognized that, although summary judgment is improper in employment discrimination cases which involve weighing of conflicting indications of motive and intent," where a plaintiff has no evidence of [9] discriminatory motive to "put on the scales for weighing," summary judgment *is* appropriate. ***Id.***

VI. Analysis

A. Count IV

In Count IV, Brown alleges that she was denied "reasonable supplies necessary in performing her duties while providing the same for similarly situated employees" and that her manager "Richard Knowles acting on behalf of

Defendant publicly demeaned Plaintiff and other female employees while not treating white males in said manner." (Doc. 1, p. 9).[5] O'Neill argues that summary judgment is proper because Brown has failed to establish a prima facie case of either race or sex discrimination. The Court agrees with O'Neill.

Title VII makes it unlawful for an employer to discriminate against an employee because of the employee's race or gender. **42 U.S.C. § 2000e *et seq***. The plaintiff must prove that she was a victim of intentional discrimination. ***St. Mary's Honor Center V. Hicks, 509* U.S. 502, 509 (1993)**. A plaintiff can satisfy her burden of proof in a race or sex discrimination case in two ways: through direct evidence of discriminatory intent or through indirect evidence demonstrated by the burden-shifting method presented in ***McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1 973). *Pasqua v. Metropolitan Life ins. Co.*, 101 F.3d 514,516 (7th Cir. 1996); *Von Zuckerstein v. Argonne Nat 'I Lab.*, 984 F.2d 1467,1472 (7th Cir. 1993)**. Here, Brown has not presented direct evidence of discrimination, and thus the Court turns to the burden-shifling method of ***McDonnell-Douglas***. [10]

The first step for Brown under the ***McDonnell-Douglas*** method is to establish a prima facie case of race or sex discrimination. ***Gonzalez y. Ingersoll Milling Machine Co.*, 133 F.3d 1025, 1032 (7th Cir. 1998); *Pasqua*, 101 F.3d at 516**. To establish a prima facie case of race or sex discrimination, Brown must show: (1) she is in a protected class; (2) she is qualified for her position; (3) she suffered an

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[5] The Court notes that Count IV contains other allegations pertaining to instances involving other women and minorities who are not parties to this lawsuit. Thus, the Court finds these allegations are not proper to support Brown's individual claims of race and sex discrimination.

adverse employment action; and (4) that others, similarly situated but not of the protected class, were treated more favorably. ***Morrow v. Wal-Mart Stores, Inc.*, 152 F.3d 559, 561 (7th Cir. 1998)(citing *Geier V. Medtronic, Inc.*, 99 F.3d 238, 241 (7th Cir. 1996)); *Spearman* V. *Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000).**

Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. ***Cowan v. Glenbrook Sec. Servs., Inc.*, 123 F.3d 438, 445 (7th Cir. 1997).** Then the burden shifts back to the plaintiff to show the defendant's reason is in fact pretext for discrimination. ***Bahl v. Royal Indemnity Co.*, 115 F.3d 1283, 1290 (7th Cir.1997).** The ultimate burden of proof remains with the plaintiff at all times. See ***Kirk v. Federal Property Management Corp.*, 22 F.3d 135, 138 (7th Cir. 1994).**

First, the Court must determine whether Brown has established a prima facie case of either race or sex discrimination. O'Neill maintains that Brown cannot set forth a prima facie case of either race or sex discrimination because she neither suffered an adverse employment action nor did her employer treat similarly situated employees outside the protected class more favorably.[6] In response to O'Neill's motion for summary judgment on Count IV, Brown contends "Count IV speaks to Mr. Knowles' bias towards women and minorities and their performance or what he [11] believes to be their lack thereof. These are disputed genuine issues of material facts." (Doc. 91, p.7). Even construing Brown's allegations liberally and drawing all reasonable inferences and resolving factual disputes in favor of Brown, the Court concludes that Brown has failed to establish a

[6] The parties do not dispute that Brown has met the first two elements of the prima facie case.

prima facie case of either race or sex discrimination.

First, the Court finds that Brown has not established that she suffered an adverse employment action. The Seventh Circuit has defined an adverse action as follows:

> [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion, evidenced by a decrease in salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

***Crady v. Liberty Nat. Bank & Trust Co., 993*** **F.2d 132, 136 (7th Cir. 1993).**

Here, Brown asserts that "not receiving necessary supplies" and "being demeaned publicly" are adverse employment actions. The Court finds that these instances are not material and do not constitute an adverse employment action. These instances neither changed her responsibilities, decreased her wages and benefits nor affected her job title. "Not everything that makes an employee unhappy is an actionable adverse action." ***Smart V. Ball State University, S9*** **F.3d 437, 441 (7th Cir. 1996).** Moreover, the Court finds that the oral reprimand Brown received cannot be considered to implicate a sufficient "tangible job consequence []" so as to constitute an independent basis of liability under Title VII. ***See Sweeney*** **v.** ***West,*** **149 V.3d 550, 556 (7th Cir. 1998)("Absent some tangible job consequence accompanying [the] reprimands, we decline to broaden**

**the definition of adverse employment action to include them.")**. These instances fall [12] short of the adverse action required to satisfy the prima facie case of either race or sex discrimination.

Further, the Court finds that Brown has not shown that similarly situated employees outside the protected class were treated more favorably. She does not name any other similarly situated employee that received "reasonable supplies necessary" or that was not "demeaned publicly." Accordingly, the Court **GRANTS** O'Neill's motion for summary judgment on Count IV.

B. Count VI

In Count VI, Brown alleges that in retaliation for her EEO involvement and to discourage her from pursuing her federally protected rights under Title VII Knowles issued her a performance evaluation for the period covering March 1, 1995 to March 31, 1996 that was, *inter alia,* in violation of the Internal Revenue Manual and Article I 2 Section 4 of the Collective Bargaining Agreement, and was "highly subjective, wreaked of retaliatory animus and was not fair." (Doc. 1, p.13). O'Neill argues that summary judgment is proper because Brown did not engage in statutorily protected activity and because she did not suffer any adverse employment action. Brown responds that her 1996 evaluation was the triggering event of several retaliatory actions directed against her.[7] Based on the following the Court finds that Brown has failed to establish a prima facie case of retaliation.

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[7] In her response, Brown raises allegations from Count VII and a new allegation that she was constructively discharged.

Title VII also "protects persons not just from certain forms of job discrimination but from retaliation for complaining about types of discrimination it prohibits."[8] ***Hamner v. St. Vincent*** **[13]** ***Hospital and Health Care Center, Inc.,*** **224 F.3d 701, 704 (7th Cir. 2000)(quoting** ***Miller v. American Family Mut. Ins.,*** **203 F.3d 997, 1007 (7th Cir. 2000); 42 U.S.C. § 2000e-3(a).** To establish a prima facie case of retaliation, a plaintiff must demonstrate: (1) that he engaged in statutorily protected expression; (2) that he suffered an adverse action by his employer; and (3) that there was a causal link between the protected expression and the adverse action. ***Hamner,*** **224 F.3d at 705;** ***Drake v. Minnesota Mining & Manufacturing Co.,*** **134 F.3d 878 (7th Cir. 1998);** ***see, e.g., McClendon v. Indiana Sugars, Inc.,*** **108 F.3d 789, 796 (7th Cir. 1997).** While the Seventh Circuit has defined adverse employment actions quite broadly, ***see McDonnell v. Cisneros,*** **84 F.3d 256, 258-59 (7th Cir. 1996),** it remains true that the adverse action must be material. ***See Rabinovitz v. Pena,*** **89 F.3d 482, 489 (7th Cir. 1996).** [N]ot everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.'" ***Smart,*** **89 F.3d at 441 (quoting** ***Williams v. Bristol-Myers Squibb Co.,*** **85 F.3d 270,274 (7th Cir.1996)).**

A successful prima facie case creates a rebuttable presumption of retaliation, ***cf. Miranda v. Wisconsin Power & Light Co.,*** **91 F.3d 1011 (7th 1996),** and shifts to the

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[8] The retaliation provision of Title VII provides that: "[i]t shall be an unlawful employment practice for an employer. . to discriminate against any individual because he has opposed any practice made unlawful employment practice by [Title VII]." **42 U.S.C. § 2000e-3(a).**

defendant a burden of articulating a legitimate, non-retaliatory reason for the challenged conduct. ***Knox,* 93 F.3d at 1334**. If the defendant does so, the presumption of retaliation dissolves, ***St. Mary's Honor Center,* 509 U.S. at 511-20 (1993)**, and the plaintiff must then establish that the employer's proffered reason is a pretext for discrimination. ***Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1399 (7th Cir. 1997)**. [14]

The Court finds that Brown has not established a prima facie case of retaliation. Brown cannot prove that she was retaliated against for complaining to the EEO counselor. Further, she cannot establish that she suffered an adverse employment action. Here, Brown was never fired or demoted. The March 1, 1995 to March 31, 1996 performance evaluation did not change her responsibilities, decrease her wages and benefits or affect her job title. In fact, Brown's performance evaluation was a good evaluation and not a negative evaluation. On a scale of one to five (with five being the highest), Brown received a score of four in the categories of workload management, application of accounting/auditing principles, issue identification, fact finding and customer relations and she received a score of five in the categories of application of law, written product and other duties and assignments.[9] When asked to expound on the certain aspects of the categories in which she received a rating of four, the Group Manager, Swain, did so in a September 30, 1996 memorandum to the NTFU Chapter 43 Chief Steward, Robert Graft. (Doc. 91, Exhibit N). Further, her performance evaluations from March 2, 1994 to March 1,1995 and March 1, 1995 to March 31, 1996 are the same. (Doc. 80, Exhibits II and JJ). The Court concludes this performance evaluation

[9] T he evaluation reveals that a score of four in the category means that Brown's work performance "exceeds fully successful" and that a score of five is "outstanding."

alone does not constitute an adverse employment action.[10] Thus, the Court finds that Brown has not [15] established a prima facie case of retaliation.[11] Accordingly, the Court **GRANTS** O'Neill's motion for summary judgment on Count VI.

C. Count VII

In Count VII, Brown alleges that:

> in retaliation for Plaintiff's FEO complaint, Plaintiff's Group Manager Kathleen Swain and Branch Chief, Deloris Featherstone subjected Plaintiff to a continuing course of intentional discrimination and retaliation which included increased work scrutiny via multiple workload and work in process reviews; 100% review on closed cases; the imposition of work-related policies and procedures more harshly that other co-workers; the denial of acting manager assignments while providing same for less experienced and less qualified co-workers. all [sic] of

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[10] Brown maintains that this performance evaluation is negative. The Court notes that a negative evaluation alone does not constitute an adverse employment action. ***See, Smart,* 89 F.3d at 442**. Further, courts are not to sit as a 'superpersonnel department' debating the merits of legitimate, nondiscriminatory criteria a business chooses to employ. ***Wade v. Lerner New York, Inc,* 243 F.3d 319, *325* (7th Cir. 2001) (citations omitted)**.

[11] In response to O'Neill's argument, Brown asserts that in response to a union grievance, the Defendants indicated that they were threatening her with a quasi-probationary status and that the Defendants did threaten her with probation. In support of this argument, Brown offers Exhibits M & N. However, a review of the pleadings and exhibits do not reveal that Defendants ever threatened Brown with either quasi-probationary status or probation.

which was with malice and reckless indifference to the federally protected rights of plaintiff.

(Doc. 1, p5. 13-14). O'Neill argues that summary judgment is proper because Brown has failed to establish a prima facie case of retaliation and discrimination. The Court agrees with O'Neill.

Again, Brown has failed to offer any evidence that she suffered an adverse employment action or that similarly situated co-workers received more favorable treatment She cannot prove that as a result of the personnel decisions, she suffered an adverse employment action under the law. Thus, the Court finds that summary judgment is proper on Count VII. Accordingly, the Court **GRANTS** O'Neill's motion for summary judgment on Count VII.

D. Counts XII and XIII

In Counts XII and XIII (the claims under the Privacy Act), Brown alleges that Swain,[16]
without her consent "willfully and maliciously unlawfully disclosed contents of Plaintiff's EEO complaints to Plaintiff's co-workers and other unidentified parties who were not entitled to receive it." (Doc. 1, p. 17). She also alleges that Defendants "did not keep accurate accounting of the date, nature, and purpose of each disclosure of Plaintiff's records and the name and address of the person or agency to whom the disclosures were made." (Doe. 1, p.18). O'Neill contends that summary judgment is proper because there is no evidence that the agency disclosure was of "records" from a "system of records" and because Brown has failed to prove an intentional violation or any damages from any alleged violations of the Privacy Act. Because the Court concludes that there is no evidence of improper disclosure, the Court

grants summary judgment on Counts XII and XIII.

The record reveals the following facts in relation to Brown's Privacy Act claims. Brown contends that Swain improperly disclosed the contents of her EEO file to Cheryl Pagan and Karen Hudgins. Brown admits that she does not know when or which contents of her EFO file were disclosed. (Brown Depo, p.242, lines 6-7, 19-21).[12] Brown further admits that she did not witness any of the alleged disclosures (Brown Deposition, p. 254, lines 24-25). In fact, Brown first learned of the alleged disclosures from Pagan while attending an IRS section 1203 training class in Springfield, Illinois in January 1999. (Brown Deposition, p.245, lines 1-7).

Pagan testified that she never saw an EEO file and that she physically did not see the contents of Brown's FF0 file. (Pagan Deposition, p.84, lines 20-21). Pagan stated that she does not have any knowledge of what was in the pink envelope that Swain placed on her desk because she [17] did not open the envelope. (Pagan Deposition, p.84, lines 24-25; p.86 lines l-25). Swain did not tell Pagan what the questions were in the envelope nor did she tell Pagan what responses were given to the questions alleged to be in the envelope. (Pagan Deposition, p.85, lines 3-11).

Brown further alleges that Swain also disclosed the contents of her EEO file to Hudgins. Hudgins maintains that Swain disclosed some of Brown's EEO file to her but not the

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12 When asked when the alleged disclosures were made, Brown responded: "The disclosures to Karen, Cheryl and Victor? They would be in a better position to answer that question." (Brown Deposition, p 242, lines 6-7). When asked to describe the items that were disclosed, Brown responded: "That would be better served as to each of these individuals, I believe. You are asking me to speculate." (Brown Deposition, p.242. lines 19-21).

entire file. (Doc. 60, Exhibit D, ¶ 4). During her deposition, Hudgins testified that she does not know whether or not the document she saw was part of an EEO file, but that she felt that it was related to an EEO file. (Hudgins Deposition p.34, lines 12-21).[13] In fact, Hudgins only remembers seeing one piece of paper. (Hudgins Deposition, p. 36,lines 11-13). She remembers seeing something about Swain flirting with a power of an attorney during an audit. (Hugdins Deposition, p.38 lines, 1-9). Hudgins does not have any direct knowledge of whether the paper she saw was part of an EEO filed because she does not know what is in an EE'O file. (Hudgins Deposition, p.40 lines 4-5).

In December1996, Swain was Brown's manager. Two times during December1996, Swain met with Brown and a representative of a taxpayer who was being audited by Brown. As a result of these meetings, Swain prepared a Performance Appraisal or a Job Visit ("JV") report. Brown received this JV report on January 1997 (Doc. 60, Exhibit F). In response to Swain's JV report, Brown submitted to Swain a five page document entitled "Response to Evaluation for On the Job Visits" (Doc. 60, Exhibit G). On page 5 of her response, Brown wrote "I went to enquire [sic] if additional information was needed and encountered Mrs. Swain stroking Mr. U----'s back." (Doc. [18] 60, Exhibit G). Upon receiving Brown's JV response, Swain called her immediate supervisor, Featherstone, and informed her of Brown's JV response and then faxed Featherstone a copy because Brown implied that Swain engaged in inappropriate contact with the power of attorney. (Doc. 60, Exhibit H).

Subsequently, Featherstone called Swain and told her that Brown's JV response should be removed from Brown's

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[13] Hudgins only assumes that what Swain shared with her was related to an EEO file. (Hudgins Deposition, ps 34-40).

Employee Performance File ("EPF") and returned to Brown. (Doc. 60, Exhibit H). Featherstone followed this verbal instruction to Swain in a written memorandum addressed to Brown through the manager of the exam group. (Doc. 60, Exhibit H). The last sentence of the memorandum stated that Brown's JV response would not be made part of her EPF file (Doc. 60, Exhibit II). Swain returned to Brown her JV response. (Doc. 60, Exhibit H).

Sometime in 1997, an EEO investigator approached Swain and presented her with Brown's affidavit and asked her to respond to it. (Doc. 60, Exhibit J). This was the only portion of Brown's EEO file that Swain saw; it did not contain any references to Swain's alleged inappropriate conduct with the taxpayer representative. (Doc. 60, Exhibits H & K). Then in mid- 1999, Swain was investigated by the Treasury Inspector General for Tax Administration based on the allegation that she had disclosed EEO related documents involving Brown to Pagan and Hudgins. (Doc. 60, Exhibit H).

The Privacy Act provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains...." **5 U.S.C. § 552a(b)**. To survive a summary judgment motion on [19] a claim for unlawful disclosure under **5 U.S.C. § 552a(g)(1)(D)**, a plaintiff must advance evidence to support a finding of four necessary elements: (1) the information is covered by the Act as a "record" contained in a "system of records": (2) the agency "disclosed" the information; (3) the disclosure had an "adverse effect" on the plaintiff; and (4) the disclosure was "willful or intentional." ***Quinn v. Stone*, 978 F.2d 126, 131 (3rd Cir. 1993); *Gowan* v. *U.S. Department of Air Force*, 148 F.3d 1182 (10th Cir.**

**1998).**

Under the Privacy Act, a "record" is defined as:

> any item, collection, or grouping of information about an individual that is maintained by an agency, including but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a voice print or a photograph.

**5 U.S.C. § 552a(a)(4)**. The definition of a "system of records" under the Act is:

> A group of records under the control of the agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

**5 U.S.C. § 552a(a)(5)**.

The Court finds that Brown has not advanced any evidence to support a claim of improper disclosure. Specifically, she has not shown that the information that was disclosed was a "record" from a "system of records." The information that Swain allegedly disclosed was obtained independently when Brown decided to make an allegation against Swain in a memorandum directed specifically to Swain. As the JV Response was not made a part of Brown's EEO file, it was never in a system of records. The single alleged disclosure to Hudgins relates to an issue in which Brown [20] complained about physical contact between

Swain and a representative of a taxpayer during an audit with Brown. The only alleged disclosure relates to a matter that Swain had personal knowledge of outside a "system of records" Moreover, Pagan never saw any records and Brown has no direct knowledge of the alleged disclosures. The single piece of paper that Hudgins saw cannot be connected to any "system of records" in Brown's EEO file. Thus, the Court concludes that there are no genuine issues of material fact regarding a violation of the Privacy Act. Therefore, summary judgment is proper on Counts XII and XIII of Brown's complaint.

VII. Conclusion

Accordingly, the Court **GRANTS** Defendants' motion to dismiss Counts VIII and XIV and for partial summary judgment on Counts XII and XIII (Doc. 53) and Defendants' motion to dismiss Counts I, II and III and for partial summary judgment on Counts IV, VI and VII (Doc. 76). The Court **DISMISSES** ***with prejudice*** Counts I, II, III, VIII and XIV of Brown 's complaint and **DISMISSES** ***with prejudice*** Featherstone, Swain and Morley as Defendants in this matter. Further, the Court **DIRECTS** the Clerk of the Court to enter judgment in favor of Defendant O'Neill and against Robbyn Brown on Counts IV, VI, VII, XII and XIII. Counts V, IX, X and XI remain for trial. The Court **SETS** the Final Pretrial Conference for October 5, 2001 at 2:00 p.m.

**IT IS SO ORDERED.**
Signed this 11th day of July, 2001.
/s/ David R. Herndon
DAVID R. HERNDON
United States District Judge

[21] [Doc. 94]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. LAWRENCE H. SUMMERS, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

No. 99-CV-0745-DRH
DISCOVERY DEPOSITION OF CHERYL PAGAN

Taken on behalf of Plaintiff
November 17, 2000

Sarah L. Paszkiewicz, RPR
Certified Shorthand Reporter
License No. 084-004225



Q. (By Ms. Brown) I'm going to refer to it.
A. Okay.
Q. The question posed to you by the counselor -- this is Plaintiff's Exhibit 1. The first question, can you read that for the record, please?
MR. LLEWELLYN: What are you having her do?
MS. BROWN: She's reading it into the

record, question Number 1.
A. Have you heard Kathleen Swain make derogatory or slanderous remarks about any members of her staff.
Q. And you responded?
A. Yes.
Q. Can you elaborate for us, please? You can review it, if you'd like.
A. I shouldn't just read it. I'll just tell you.
MR. LLEWELLYN: Don't just read it. It speaks for itself. You can take the time to read the entire document if you wish to take the time to read the entire document.
Q. (By Ms. Brown) Sure, go ahead. No



problem. There's some other pages.
A. I almost forgot what the question is now.
Q. That's okay. If so I apologize. I'm not too familiar with your writing, so if you would tell us in your own words exactly when or if Kathleen Swain made derogatory or slanderous remarks about members of her staff.
A. We were at the Fairview Heights office and there was a joint group meeting, and we were in the conference room, the one that expands from two small rooms to one big one on the exam side. And I don't recall if it was either break or lunch, but we were breaking after the meeting.
Q. Okay.
A. And one of the other employees was talking about a case and about still having it open.
Q. Okay.

A. And Kathleen made the remark that, you know, well, that's one of Robbyn's cases and that's why it's still open. And she commented about your -- Robbyn's cases having high time and that -- that Robbyn went into too much detail and examined every little expense regardless of what

[Page] 16

it was, even down to pennies and dollars and stuff that shouldn't really be looked at, and especially in travel and entertainment expenses.

Q. Okay. Ms. Pagan, are you a group manager?

A. No.

Q. Do you hold any supervisory type of position?

A. No.

Q. So when you were in this room, this was within ear shot, was she telling you this directly or was she just speaking to another employee and you overheard it?

A. She was speaking to another employee that had that case that she was referencing, and I'm -- it wasn't a hushed conversation. It was a very open conversation as people were leaving the room.

Q. Okay.

A. The room was not empty.

Q. I understand. Who was this other employee?

A. That, I'm sorry I don't recall at this point.

Q. That's okay. That's fine. To the

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best of your recollection, was this another

manager she was speaking to?
A. No. It was the employee that -- that was working the case.
Q. Would this other employee have been involved in EEO type of matters with respect to the matter that's before us, to your knowledge?
MR. LLEWELLYN: Objection, relevance.
Q. (By Ms. Brown) You can still answer the question. It will just be noted that he's objecting.
A. Well, I'm not sure I understand the question.
Q. Okay. This was a group meeting then, so when you say group meeting, this would have been members of the group that Kathleen Swain managed?
A. Yes.
Q. That would have been a group formerly known as Group 8, correct?
A. Group 8.
Q. To the best of your knowledge, are any of those employees or were any of those employees at the time EEO investigators?
A. Not to my knowledge.

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Q. Okay. Was this a group meeting dealing with EEO matters?
MR. LLEWELLYN: I'm going to object to the relevance. This is -- There is no evidence that this conversation was an EEO related matter, but you can answer.
Q. (By Ms. Brown) You can continue to answer. It will just be noted that he's objected to it.
A. Not that I recall. I just recall it

just being a normal group meeting.
Q. I understand. The second question is, did you -- We're reading from Plaintiff's Exhibit 1. Would you read the second question that was posed to you?
A. Did you hear Kathleen call any member of her staff "Judas," and the response to that is yes.
Q. Can you elaborate on that, please?
A. Yes. It was -- Kathleen was down in the Carbondale office, I don't recall for what matter at this point, but she was still group manager. And it was December 1998, and I asked her if Robbyn was back from maternity leave and if Robbyn had brought the baby in for everyone to



see.
And Kathleen indicated -- she said that -- she talked about the baby. She said that she didn't say much or touch the baby, she said because you know how Robbyn is. And then after she said you know how Robbyn is, she said everyone has their Judas.
Q. Would this be the Judas as referred to in the Bible? Is that the way you took it?
A. That's the way I understood it.
Q. One of the disciples or former disciples of --
A. Who betrayed Jesus.
Q. Okay. Number 3, can you go over that one, please? I'm sorry. Before we do that, can we go back to Number 1, if you could please.
When these comments were made, I know the question was posed did she make derogatory or slanderous remarks about members of her staff.

Were these comments complimentary? Did you perceive them to be complimentary?

A. No.

MR. LLEWELLYN: Objection. That's asking her -- calling for speculation and perception.

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Q. (By Ms. Brown) Can you answer the question, please?

A. I did not find it complimentary. In fact, I was surprised to hear the comment and I thought it was improper to me as an employee to be subjected to those comments.

Q. I understand.

A. It made me uncomfortable.

Q. You stated earlier that you were already in the group when Ms. Swain came to be the manager of that group?

A. Yes.

Q. So then have you worked for other managers of that particular group prior to Ms. Swain?

A. Yes.

Q. Who were you former managers?

A. My first group manager, it was the old Springfield district, because I transferred down here in December of '84, from what was formerly known as the Chicago district.

Q. Okay.

A. And when I came down here in December of '84 to the Carbondale office, Les Dalen, he was originally out of Mt. Vernon Oil and Gas, was

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the group manager. And then after Les Dalen

left, our next group manager for Group 8 was Lloyd Dinkleman, and then after Lloyd left the position, he went back to the field as large case agent, Yolanda Carruthers Thorpe became our group manager of Group 8.

Q. Okay.

A. And then after she stepped down and went back to the field, Kathleen Swain became our group manager.

Q. So it's Les Dalen, Lloyd Dinkleman?

A. Uh-huh.

Q. And then?

A. Yolanda Carruthers Thorpe, and then Kathleen Swain.

Q. You stated earlier you've been with the service over 20 years?

A. Yes, that's correct.

Q. In the past have you filed a complaint -- Did you ever file a complaint against Ms. Thorpe for retaliation or reprisal?

MR. LLEWELLYN: Object to the relevance.

A. No.

Q. (By Ms. Brown) Okay. What about

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Mr. Dalen?

A. No.

Q. Same question for Mr. Dinkleman?

A. No.

MR. LLEWELLYN: Same objection.

Q. (By Ms. Brown) Okay. So prior to Ms. Swain you have no history of filing a union grievance or EEO complaints alleging retaliation or reprisal?

MR. LLEWELLYN: Asked and answered.

Objection, asked and answered. You can answer.
Q. (By Ms. Brown) You can answer.
A. No, I hadn't. The one with Kathleen was the first one.
Q. In over 20 years of service?
A. Yes.
Q. If we could please, if you would read Number 3.
A. Did you hear Kathleen say that any member of her staff had been dumped on her because she, Kathleen, was a new manager.
Q. And you responded?
A. Yes.
Q. Could you please elaborate for the record?

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A. Myself and my husband, revenue officer Pagan and group manager Kathleen Swain were having lunch at Hunan's, which is a Chinese restaurant in Carbondale, and Kathleen was complaining the whole lunch time about Robbyn filing the DEO complaint against her and how it was frivolous. And she said that Robbyn had filed a grievance and didn't get very far with that so therefore Robbyn decided to file a DEO complaint.
And she said that Robbyn had been dumped on her, which was Kathleen Swain, by Richard Knowles because Kathleen was a new group manager and that Richard wanted to get rid of Robbyn because Robbyn was a troubled employee.
Q. Those were the words that she used?
A. Yes, that you were a troubled employee.
Q. Okay. When she was telling you and

you say your husband, Victor Pagan, Mr. Pagan was a revenue officer in Carbondale as well?
A. Yes.
Q. And he's been employed with the service how long?
A. Since April of 1974.

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Q. Okay. When she stated these things what was your response? How did it make you feel?
A. Well, it made me uncomfortable. And I don't recall having much to say about it.
Q. Did you and Mr. Pagan have the opportunity to discuss this conversation with Ms. Swain after the fact?
MR. LLEWELLYN: What part of the conversation?
Q. (By Ms. Brown) The part of the – conversation where she told her that Robbyn Brown was dumped on her because she was a new manager, just to the best of your recollection?
A. Boy, I don't recall discussing it again with her. I was mainly just listening that day.
Q. That's fine. Can we go on to Number 4?
A. Sure.
Q. Would you read that, please?
A. Did Kathleen share an EEO file with you?
Q. And you responded?
A. Yes.

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Q. And the second part was if so who's

file was it, and you responded?
A. Robbyn Harris-Brown.
Q. What exactly did she share with you, Ms. Pagan?
A. Let me think how I want to word this.
Q. That's fine. Take your time.
A. The day she shared this with me it was the same day that we were at Hunan's.
Q. For lunch?
A. For lunch, where she was discussing the DEO complaint and what she shared with me, before we left for lunch, and she told me that she had something she wanted me to read and check for spelling and to see if her responses that she had written in this document were logical and answered the questions correctly, because all morning long she had been talking about the DEO complaint throughout the office and complaining about it, and she had been working on the questions that the DEO investigator had left with her at the computer that we use. We call it the library computer.

And so anyway, we left for lunch and as we were going out the door, she asked me, you



know, when we got back would I proof it for spelling and check it for her responses. And I said yes, because at that point I didn't know what it was.

And we came back from lunch, and I either went to the ladies' room or outside for a cigarette, I don't know which or both, because that's my normal habit before I go back in, and Victor, my husband, and Kathleen went on back into the office.

And when I came back to my desk, there was a pink envelope that says to be opened by addressee only on my desk on top of my other paperwork that I had been working on that morning. And I asked Kathleen if she had put that there and if this is what she wanted me to read. And she said yes. And I said well, what is it, because I was a little concerned because it was in a pink envelope. Being in service you know what a pink envelope is.

And she told me and I didn't see what was actually inside the envelope, only what she told me, she said it was the questions that the DEO investigator had left regarding Robbyn's DEO complaint and her responses to those questions.

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And I laid it back on my desk for a moment because I had gone over to the computer where she was working, and then I asked Victor, my husband, about that because I was concerned that -- he had been a former DEO investigator. And I said I can't read this, can I, and he told me no.

And so then I went and gave it back to Kathleen, and she came over by my desk and I told her -- she wanted to know why not. I said well, I can't read it because it's confidential and if anyone were to ever ask me if I had any knowledge or read it, I would have to tell them the truth and say yes, and I asked her not to tell me anymore about the DEO investigation, and at that point she dropped it.

Q. You mentioned earlier that she was going around the office talking about this in Carbondale.

A. Yes.
Q. Now, Ms. Swain didn't actually work in the Carbondale office; is that correct?
A. No. She was -- Her office was officially in Fairview Heights, but she would come down periodically because there were group

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members in the Carbondale POD of Group 8 and she was the manager, so...
Q. So it was somewhat of a satellite office then?
A. Yes.
Q. She operated or she managed two -- actually two locations?
A. Yes, two PODs.
Q. Okay. POD, would that --
A. Post of duty.
Q. Okay. You stated that she was going around the office talking. Were there other people -- other employees there besides yourself -- on that particular day besides yourself and Mr. Pagan?
A. Yes. Karen Hudgins, a revenue agent, was in the office that day.
Q. Any other individuals?
A. I'm not 100 percent sure on that.
Q. You stated earlier that at one point you were the Hispanic program manager, which is a collateral EEO assignment.
A. Yes.
Q. Have you been trained in any EEO processes under that -- in that particular

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position?

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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBBYN BROWN,

*Petitioner*

v.

JOHN H. SNOW, et al,

*Respondents*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Seventh Circuit.

# PETITION FOR WRIT OF CERTIORARI – APPENDIX II

Robbyn Brown, Pro Se
P.O. Box 0034
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(618) 632-5796 Ext. 132

A. In that particular position, no.
Q. Didn't offer you any?
A. No. That's wrong. I'm sorry. Yes, I went to a training in Springfield, I think. Was it in Springfield? I know I went to one. I'm sorry. I did go to one.
Q. Did they ever tell you that the EEO complaints were covered by the privacy act, or were you aware that EEO complaints -- prior to your discussion with Mr. Pagan, were you aware that they are covered by the privacy act?
MR. LLEWELLYN: Well, can she answer the first question first?
Q. (By Ms. Brown) Please.
A. I knew they were confidential, but I don't recall ever being told formally prior to, you know, my discussions with Victor that it was a breach of the privacy act.
Q. Would it be fair to say then that it made you feel uncomfortable such that you had to go and speak with Mr. Pagan regarding that before you responded to Ms. Swain?
A. Yes. I felt it put me in an awkward position.

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Q. Okay. We're on page two of Plaintiff's Exhibit 1, question Number 5, that was posed to you. Would you read that please for the record?
A. Did you hear Kathleen say that she had an employee who filed frivolous EEO complaints, and the answer to that is yes.
Q. And again, for the record you were not a manager at the time that you heard it?
A. No, I was not.

Q. Again, for the record, you were not -- you were not an EEO investigator?

A. No.

MR. LLEWELLYN: Are you going to ask this for every question? We'll stipulate that she is not a manager or an EEO investigator for the remainder throughout the questions.

MS. BROWN: Mr. Llewellyn, please. I'm sorry.

MR. LLEWELLYN: It's been asked and answered.

Q. (By Ms. Brown) You stated that you were not an EEO investigator. Were you employed by the regional complaint center?

A. No.

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Q. Okay. Can we go to Question 6 now? If you would, please read it for the record.

A. Have you seen or heard Kathleen do anything that you felt was discriminatory. If yes, please explain. It was that same day in December when Kathleen was down, December of '98. She was working in one of our conference rooms at an extra computer we had, a desk top, and she was working on two of my case file reviews.

And I went in there to talk to her about the case files, and while I was there -- because she was talking about what good cases they were and how well they were put together -- she started to complain about the cases we had been getting back from Chicago, which was where they were processed out.

And she was stating that they lost disks, they took paperwork out, and then would say it wasn't there when we really had -- had

everything together when the case left the group when it was properly assembled.

And she further stated that those people in Chicago don't know how to do their jobs, and when they're called on it, they hide behind DEO.

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Q. Question Number 7, would you read it for the record, please?

A. Do you think your work environment is hostile? If yes, please explain.

Well, during that time period I felt that the work environment was hostile because based on the things that had happened to me with Kathleen, based on what she had told me --

MR. LLEWELLYN: Is there a time frame we're talking about here?

A. Well, let's see.

Q. (By Ms. Brown) This was dated May 14th, 1999, so it would be prior to that. We can discuss events that transpired after that later.

A. It was during 1998 that I felt that Kathleen retaliated against me and engaged in reprisal against me, and also because of the statements that she had made about Robbyn Brown and the information that she had planned to share with me about Robbyn Brown, I felt the whole situation was hostile.

Q. So Ms. Swain is no longer a group manager; is that correct?

A. That's correct.

Q. Has the environment improved since

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she's left, in your opinion?

A. Yes.

MR. LLEWELLYN: I'm going to object to the form of the question as her speculating to the environment with any other employees except to her own personal experience.

MS. BROWN: That's fine. We are going to depose the other employees so we can get their information separate.

Q. (By Ms. Brown) Number 8, if you would read that, please.

A. Has any member of your group or in your POD shared with you any information regarding Kathleen sharing an EEO file with them or that she made derogatory or slanderous comments about any employees. If yes, please explain.

And the response to that is yes. The two people I know of are Karen Hudgins -- do you need a spelling? It's H-u-d-g-i-n-s -- and Victor Pagan.

Q. You've already stated for the record that Mr. Pagan was present when she made comments regarding plaintiff's performance at the -- during your lunch period, and that he had advised



you not to open the EEO file that she attempted to share with you.

MR. LLEWELLYN: I'm going to object to the form of that. There is no evidence that it was an EEO file at this time.

Q. (By Ms. Brown) You stated that Ms. Swain told you that those were questions provided by the EEO investigator, which there has been evidence introduced previously that the EEO investigative file contained --

MR. LLEWELLYN: Object to the form.
Q. (By Ms. Brown) -- the EEO questions --
MR. LLEWELLYN: Object to the form as you're calling it an EEO file. That's my objection.
Q. (By Ms. Brown) The EEO investigative file then, we haven't addressed information that Ms. Hudgins shared with you. What would that be? You stated that you discussed that -- something -- something to the effect that you discussed something with her?
A. I know that Kathleen shared a paper with Karen regarding Robbyn Brown.
Q. Is this something Ms. Hudgins told you

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or something you witnessed?
A. It's something she told me.
Q. Okay. Has Ms. Hudgins shared anything else with you regarding the file?
MR. LLEWELLYN: Again, objection with regard to referring to it as a file.
Q. (By Ms. Brown) You can still answer the question.
A. I think I should probably let Karen speak for herself.
Q. Okay. What exactly has -- In your recollection has Ms. Hudgins shared with you then? You won't speak for what she has in her possession, you'll just speak from -- you'll just attest to what she shared with you or what she told you.
A. Well, we have discussed the fact that Kathleen talked a lot and she talked about things that she shouldn't discuss, things that were

confidential about you, and that how anyone could say she hadn't breached the privacy act would be beyond us.

Q. Okay. Do you have concerns that she would breach information regarding your employee file?

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A. Yes.

Q. Do you think that she's done that?

A. Yes.

Q. Do you suspect that she's done that?

A. Yes.

Q. What evidence do you have to that effect?

MR. LLEWELLYN: I'm going to object at this point. The evidence with regard to her case has no relevance in this case.

Q. (By Ms. Brown) He can object. You are still required to answer the question though.

MR. LLEWELLYN: I'm going to advise her -- She can make the determination whether or not she wants to answer that question based upon her own pending case and whether or not she wants to disclose that information here.

A. Well, my case is closed.

Q. (By Ms. Brown) Okay.

A. My case was closed in May of 2000, but I'm not at liberty to state how it was closed.

Q. That's fine.

A. It was at a group meeting at Caseyville, and it was in 1999 shortly after Kathleen left the group. And I think it may have

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been June. I could find out for sure.

Q. Okay.
A. But the meeting had ended and I was getting ready to get into my car, and tax auditor Bill Spiser called to me and asked me to wait a minute, and he walked over to my car.
And Bill and I have always been cordial and professional and talk about, you know, his dog and just different things, and I asked him, you know, friendly, I was friendly, you know, like what's up or something like that, you know, I gave him a greeting.
And Bill said to me, said, well, I don't appreciate what you have done to our group manager.
Q. Was he joking?
A. No. He was serious and he was angry.
MR. LLEWELLYN: I'm going to object to the form of the question.
Q. (By Ms. Brown) How did you perceive his behavior to be? Did you feel uncomfortable?
A. I felt attacked.
Q. Attacked. That's a pretty harsh word.
A. Verbally attacked.
Q. Did you report this to anyone?

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*********

A. Yes, I did.
Q. To whom?
A. To the DEO office.
Q. Did anything come out of this to your knowledge?
A. No, because at another meeting --
MR. LLEWELLYN: Is there a time?
A. It's after that. I'm not sure when it

was. It was a survey feedback meeting, not for survey 2000 but for survey '99, so it would have been probably late summer of '99 or September of '99.

Mr. Spiser once again -- we were at the Caseyville township hall and he was in the meeting room already, no one else was there, and I walked in, and -- and then he started complaining again about what I was doing to the group manager and, you know, he was just -- I don't remember exactly what he said because I was shaken up by it.

And I left the room and went to the ladies room, and then when I came back to the meeting room, Karen Hudgins had arrived.

Q. Did anyone else witness this then?

A. No, I don't think so. I think it was

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of 2000?

A. Yes. I finally got the paperwork in May of 2000.

Q. The remedies you sought, did you receive it?

A. Yes.

Q. Thank you. Ms. Pagan, you mentioned earlier that you've attended group meetings in Caseyville. Would that be the Caseyville Township Building?

A. Yes.

Q. Okay. You've -- at some of these group meetings there -- well, at these group meetings representatives from National Treasury Employees Union, otherwise referred to as NTEU, they're required to be there; is that correct?

A. Yes.

Q. One of these meetings Todd Harbor, who represented you in a matter, he was present; is that correct?
A. Yes.
Q. What -- In your opinion what was the climate of that meeting? There were several discussions that took place. How did you perceive the meeting to be in terms of employee

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involvement and -- and the employee involvement, their interaction with one another?
MR. LLEWELLYN: I'm going to object to the compound nature of the question. If you understand the question, you can answer it, but I don't understand the question.
A. Well, I'd like to hear it again, but I would kind of like to go to the ladies room.
MS. BROWN: We can take a break now. Is that acceptable to you two? About 15 minutes then?
THE WITNESS: Yes.
MS. BROWN: It's about 11:22 by that clock. We'll be back here about 11:37 or 11:40.
(Whereupon a brief break was taken.)
(Whereupon the reporter read back the last question.)
Q. (By Ms. Brown) Can you answer the question now, please?
A. It was a survey feedback meeting for survey 1999, and it was -- It was like in the late summer or early full of '99 the meeting was held. Todd Harbor was there. Glen Glauber, G-l-a-u-b-e-r, was our acting group manager. Glen came in, I think, in August, and Todd Harbor

was there along with other group members.

And the meeting was getting totally out of control. There were loud voices. There were comments made by two of the group members. These comments were against Robbyn Harris-Brown.

And the two people that made the comments was Catherine Gilmore Murphy and Diane Winsing.

Q. Do you remember what those comments were or what was -- what was the gist of those comments?

A. Well, Bill Spiser was also involved in this, too. So it was those three that were -- they were arguing about the way the group conditions were and how they had been, and instead of blaming Kathleen Swain, as I thought they should have for the group conditions and the divisiveness of the group, they were -- Diane, Catherine and Bill were blaming Robbyn, saying she had caused all the problems in the group.

And Todd Harbor was representing the union, and he was trying to interject and trying to calm things down. And I heard Bill Spiser tell Todd, if you don't shut up and stop it, I'm going to hit you.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. LAWRENCE H. SUMMERS, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

No. 99-CV-0745-DRH
DISCOVERY DEPOSITION OF KAREN HUDGINS

Taken on behalf of Plaintiff
November 17, 2000

Sarah L. Paszkiewicz, RPR
Certified Shorthand Reporter
License No. 084-004225

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Can you review it to see whether or not that -- those comments or those statements were yours and whether or not you signed that particular document?

A. Yes, they are and I did.

Q. Okay. Would you review the statements? We will be going over those, so I just want you to take a few minutes to look it over.

MR. LLEWELLYN: Mark it as Plaintiff's 1?

(Whereupon Exhibit 1 was marked.)

Q. (By Ms. Brown) Would that -- Is that a document that you signed or is that a copy of a document you signed? That is your signature?

A. Yes.

Q. We are going to be going over that. I'll direct your attention to question Number 4. Would you read that for the record, please?

A. Did Kathleen share an EEO file with you.

Q. And your response was?

A. Yes.

Q. Is that still your testimony?

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A. As I think when I elaborated just a little bit in the sentence below, I did see something. I really cannot definitely say that it was an EEO file, but it was something relating to an EEO file. I don't actually know what is in an EEO file.

Q. Since you never filed an EEO complaint you're not familiar with what's enclosed with an EEO file?

A. No, I'm not.

Q. What exactly was it that you saw that made you believe it was related to an EEO file?

A. Well, considering that this has been at least three years ago, my memory is not crystal clear relating to it, but it was a document that did indicate complaints that Robbyn Brown had against Kathleen Swain regarding discrimination.

Q. Okay. Did you ask Ms. Swain to give

you that file?
A. No.
Q. You stated earlier that you're a revenue agent. During the time that Ms. Swain shared this file with you, what -- this EEO related matter with you, were you -- were you a

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manager at that time?
A. Was I a manager?
Q. Yes.
A. No.
Q. Were you an EEO investigator?
A. No.
Q. Were you acting as a manager?
A. No.
Q. How did it come about? Did she just walk up to you? How did -- Can you tell us what exactly happened there?
A. Kathleen would come to our Carbondale office periodically to visit the employees there. And she offered to show me this document basically. It was in the afternoon. I don't remember what day. And the best I can do really, it was in 1997 sometime.
Q. Okay. That's fine. So she -- did she say, do you want to see this file or --
MR. LLEWELLYN: I'm going to object to the form of the question referring to it as file.
MS. BROWN: How would you like for me to describe it?
MR. LLEWELLYN: That's my objection.
MS. BROWN: Okay. Your objection is

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noted.

Q. (By Ms. Brown) How did she approach you, to the best of your recollection?
A. It was related to she had been discussing the complaint with me.
Q. Okay. Did you initiate this conversation?
A. No.
Q. And again, Ms. Swain was your manager at the time?
A. Yes.
Q. Did you ask her not to discuss this with you?
A. No.
Q. How did you feel about the information being shared with you regarding another employee?
A. At the time, really I was just more saddened at the fact that there was a complaint going on.
Q. Okay. Can you read question Number 5, please?
A. Did you hear Kathleen say that she had an employee who filed frivolous EEO complaints?
Q. Your response was?
A. Yes.

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Q. Who was that employee?
A. Robbyn Brown
Q. And you go on to state?
A. I don't remember the exact wording of what was exactly said, but Kathleen did discuss that there had been a complaint filed and that she believed that it didn't have any merit so those probably weren't her exact words.
Q. Have you had the opportunity to discuss this with anyone else, this complaint?

A. Cheryl Pagan and I work in the same office and we haven't --

MR. LLEWELLYN: I'm going to object. Clarification, which complaint are we discussing?

MS. BROWN: We're talking about the matter that she's here being deposed for, Robbyn Brown versus Lawrence Summers, Dorian Morley, D-o-r-i-a-n, M-o-r-l-e-y, Delores Featherstone and Kathleen Swain.

Have you had any opportunity to discuss this case with anyone else?

A. Cheryl Pagan and I work in the same office, and we have discussed maybe not the particulars and the details, but discussed the complaint somewhat.

********

ROBBYN BROWN, Plaintiff vs. LAWRENCE H. SUMMERS, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

Cause No.

COMPLAINT

(Filed September 30, 1999)

COMES NOW the Plaintiff, ROBBYN BROWN, Pro Se, and for her Complaint against Defendants, LAWRENCE SUMMERS, SECRETARY OF THE TREASURY, et al; DORIAN MORLEY, DIRECTOR, REGIONAL COMPLAINT CENTER OF THE DEPARTMENT OF THE TREASURY; DELORIS FEATHERSTONE AND KATHLEEN SWAIN, MANAGERS WITH THE INTERNAL REVENUE SERVICE, AN AGENCY OF THE DEPARTMENT OF THE TREASURY, states as follows:

1. Plaintiff brings suit against Defendant Lawrence H. Summers, Secretary of the Department of the Treasury, et al, pursuant to Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et. seq., and The Civil Rights Act of 1991, 42 USC 1981a.

2. Plaintiff brings suit against Defendants Deloris Featherstone and Kathleen Swain et al, pursuant to 42 USC §§ 1981, 1983 and 1985. [1]

*********

6. In furtherance of Defendant's continuing course of intentional discrimination and retaliation for Plaintiff's prior complaints, Kathleen Swain without Plaintiff's consent, and in violation of the Privacy Act, 5 USC 552a-(b) and the Freedom of Information Act, 5 USC 552:

    a. Willfully and maliciously unlawfully disclosed contents of Plaintiff's EEO complaints to Plaintiff's co-workers and other unidentified parties who were not entitled to receive it;

    b. Knew that disclosure of the specific material was so prohibited, and

    c. Provided false information regarding the complaints to said co-workers.

7. In furtherance of Defendant's continuing course of intentional discrimination and retaliation for Plaintiff's prior complaints, Kathleen Swain maligned Plaintiff's character and professional reputation to Plaintiff's co-workers and other unidentified parties.

8. All of the foregoing was done with the intent to inflict further emotional distress upon Plaintiff, undermine Plaintiff's position authority, defame Plaintiff's character, alienate Plaintiff from her co-workers, and to further cultivate a hostile working environment.

9. Said actions created a hostile working environment in which other employees engaged in ridicule, insults and similar inappropriate and demeaning conduct towards plaintiff in violation of the Internal Revenue Service's Rules of Conduct and with malice and reckless indifference to the federally protected rights of plaintiff.

10. Said actions created a hostile working environment in which other employees colluded to provide false and evasive answers to impede the investigation of this claim, in violation of the Internal Revenue Service's Rules of Conduct. [17]

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
**Office of Federal Operations**
**P.O. Box 19848**
**Washington, D.C. 20036**

Robbyn C. Brown, Appellant, v. Robert E. Rubin, Secretary, Department of the Treasury, Agency.
Appeal No. 01981074
Agency No. 97-3084

DECISION

Appellant filed an appeal with this Commission from a final decision of the agency concerning her complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. The final decision was received by appellant on October 23, 1997. The appeal was postmarked November 22, 1997. Accordingly, the appeal is timely (see 29 C.F.R. §1614.402(a)), and is accepted in accordance with EEOC Order No. 960, as amended.

On May 7, 1996, appellant initiated contact with an EEO Counselor. The record contains the report of an agency EEO Counselor who stated that on June 10, 1996, appellant discussed her current annual appraisal [March 1, 1995 through March 31, 1996] that was written by her Manager and her Branch Chief; and that she stated that she would file a grievance with her Union on this matter.

On June 25, 1996, appellant filed a grievance. The subject of the grievance was identified in the following fashion:

Objection is made to the failure and refusal of the agency to prepare grievant's annual appraisal in a fair and objective manner. In addition, the narrative evidences reprisal for the exercise of grievant's appeal rights granted by law, rule or regulations.

On January 3, 1997, appellant filed a formal complaint, alleging that she was the victim of unlawful employment discrimination on the bases of race, sex, and reprisal.

By letter to appellant dated February 6, 1997, the agency stated that appellant's complaint was comprised of eight allegations. At the conclusion of the letter, the agency noted that the EEO Counselor's Report reflected that appellant had a pending union [2] grievance regarding her most recent performance appraisal. The agency asked appellant if this were correct, and if appellant was raising the issue of this performance appraisal in her formal complaint.

By letter dated February 15, 1997, appellant stated that the appraisal had been raised during pre-complaint processing, but that she was pursuing the matter through a union grievance and not in her formal complaint.

By letter dated May 20, 1997, an agency Chief informed appellant's Union Steward that the agency was unable to continue the processing of the grievance in the negotiated grievance forum because appellant was substantially involved with the EEO process and "has elevated her complaint to a formal status."

By letter dated September 19, 1997, the agency informed appellant that the Investigative File reflected that the issues raised in her formal complaint were comprised of the

following allegations:

1.Whether Complainant was discriminated against . . . when on or around May 7, 1996, she learned that on various occasions between 1994 and 1996 her former manager allegedly (a) assigned selective return work assignments to other co-workers; and (b) did not assist her with employee development.

2. Whether Complainant was discriminated against . . . when on or around May 8, 1996, she was not selected for a temporary one year promotion to the position of Internal Revenue Agent, GS-512-13 for Vacancy Announcement Number NFB 95-5O8MSL.

3.Whether Complainant was retaliated against by her current Manager and Branch Chief when (a) she was subjected to multiple workload/work in process reviews; (b) she was subjected to 100% case file evaluations on closed cases; (c) she was subjected to the imposition of work-related policies and procedures more harshly than other co-workers; and (d) she was denied Acting Manager assignments.

At the conclusion of the letter, the agency indicated that the "remaining issues" of appellant's complaint would be addressed in separate correspondence.

By letter dated October 6, 1997, appellant requested that her current performance appraisal be reinstated as part of her formal complaint.

[3]

On October 21, 1997, the agency issued a final decision that is the subject of the instant appeal. Therein, the agency solely addressed the allegation regarding the March 1995 -

March 1996 performance appraisal, and dismissed this allegation on the grounds that appellant raised this matter in a previously filed grievance. Specifically, the agency found that appellant's union grievance on this matter, filed on June 25,1996, preceded the filing of the formal EEO complaint on January 3, 1997.

On appeal, appellant argues that she was provided false information by the agency, and that she relied upon such information in removing the performance appraisal of March 1995 to March 1996, from the EEO complaint process in order to pursue this matter under the negotiated grievance procedure.

Appellant states that following her initial EEO Counselor contact on May 7, 1996, she received the March 1995 - March 1996 performance appraisal on or about June 3, 1996, by her Manager. Appellant further states that at that time, her Manager informed her that the performance appraisal was prepared by an agency Branch Chief; that the appraisal's narrative contained evidence of reprisal; and that appellant submitted a copy of the appraisal to the EEO Counselor with the intention of expanding her complaint to address this issue. Appellant argues that on June 12, 1996, the agency EEO Counselor informed her that the agency Branch disavowed any knowledge of appellant's pursuit of the EEO complaint process and, as such, could not have acted in reprisal against her through the issuance of the appraisal. Appellant states that she thereupon consulted a union official with the intent of pursuing the appraisal through the grievance process; and that the union official expressed concern that the issue of her appraisal was part of her EEO complaint. Appellant states that she informed the union official of the EEO Counselor's statement that the Branch had no knowledge of her pursuit of the EEO complaint process; and that the grievance was filed on June 25, 1996. Appellant

argues that she subsequently discovered in September 1997, that the agency Branch Chief who prepared her performance appraisal had been aware of appellant's decision to pursue the EEO complaint process as early as May 11, 1996.

Moreover, appellant argues that on May 20, 1997, the agency Branch Chief informed appellant's Union Steward that the agency could not process her grievance because the issue was raised in the EEO Forum.

In response, the agency argues that appellant was not induced to abandon her intention to pursue the March 1995 - March 1996 [4] performance appraisal in the EEO complaint process. Specifically, the agency argues that a review; of the EEO Counselor's report contradicts appellant's assertion, and that appellant specifically told the EEO Counselor that her intention was to file a union grievance. Moreover, the agency argues that nothing in the EEO Counselor's report suggests that appellant intended to pursue the allegation relating to the performance appraisal in the EEO complaint process. In support of this argument, the agency makes reference to several pages in the EEO Counselor's notes that include the following entries:

June 10, 1996

Complainant discussed her current annual appraisal written by her manager and the Branch Chief. She stated she would file a grievance with the union. She stated her rating was unchanged and it did not reflect her performance.

June 12, 1996

Discussed complaint status with complainant on the telephone.

The agency acknowledges that it "erroneously discontinued" processing of appellant's grievance on May 20, 1997. The agency argues however, that by letter dated January 29, 1998, it agreed to reinstate and complete the processing of the grievance and that, therefore, appellant will not be without a remedy. In support of this argument, the agency faxed the Commission a copy of a letter dated January 29, 1998. Therein, the agency informed a Union Official that the agency is "ready, willing and able to reactivate the processing of [appellant's] grievance."

The record in this case contains a copy of a National Agreement between the agency and the National Treasury Employees Union which provided that "employees who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, or handicapping condition have the right to raise the matter under the statutory procedure or the negotiated grievance procedure of this agreement, but not both."

EEOC Regulation 29 C.F.R. §1614.301(a) provides that when an employee wishes to file a complaint or a grievance on a matter of alleged discrimination, the employee must elect either the negotiated grievance procedure or Part 1614 of the EEO complaint process, but not both. This subsection also provides that an election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance. [5]

EEOC Regulation 29 C.F.R. §1614.107(d) provides that when a complainant has raised the matter in a negotiated grievance procedure and the complainant has elected to pursue the non-EEO process, the agency must dismiss the EEO complaint.

Appellant filed a grievance in May1996, on the issue of a

March 1995 – March 1996 performance appraisal. We are unpersuaded by appellant's contention on appeal that her decision to file a grievance was attributable to being improperly misled by agency EEO officials into refraining from pursuit of the EEO complaint process regarding this matter. Given the present record, however, we are unable to ascertain whether appellant has currently "raised the matter in a negotiated grievance" contemplated by Section 1614.107 (d). Specifically we note that the agency erroneously discontinued the processing of appellant's May 1996 grievance by letter dated May 20, 1997. We further note that by letter to appellant's Union Steward in January 1998, the agency indicated that it was prepared to "reactivate" the processing of the grievance. The record contains insufficient evidence, however, to determine whether appellant had reinstated the grievance she filed in May 1996. Accordingly, the agency's decision to dismiss the allegation regarding the March 1995 - March 1996 performance appraisal on the grounds that appellant raised this matter in a previously filed grievance is VACATED. Appellant's allegation is REMANDED to the agency for further processing in accordance with the ORDER below.

ORDER

The agency shall conduct a supplemental investigation to determine whether appellant reinstated the grievance that was originally filed on May 25, 1996, relating to her performance appraisal of March 1995 - March 1996. If, thereafter, the agency determined that appellant reinstated the grievance, the agency is ORDERED to issue a new final agency decision. If, however, the agency determines that appellant did not reinstate the grievance, the agency is ORDERED to notify appellant of the further processing of the allegation relating to the performance appraisal from the point that processing of this allegation ceased. The supplemental investigation and

issuance of the final decision or notice of processing must be completed within thirty (30) calendar days of the date that this decision becomes final.

A copy of the final agency decision and/or a copy of the agency's notice of further processing of the allegation must be sent to the Compliance Officer as referenced below.

[6]

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0595)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the appellant. If the agency does not comply with the Commission's order, the appellant may petition the Commission for enforcement of the order. 29 C.F.R. §1614.503(a). The appellant also has the right to file a. civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§1614.408, 1614.409, and 1614.503(g). Alternatively, the appellant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§1614.408 and 1614.409. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. §2000e-16(c) (Supp. V 1993). If the appellant files a civil action, the

administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. §1614.410.

*******

MAY 17, 1999 FOR THE COMMISSION:

/s/ Carlton M. Hadden

DATE Carlton M. Hadden, Acting Director
Office of Federal Operations

the affidavit then?
THE COURT: Well, I don't know if that would be the appropriate way to do it. Do you have the '96 claim there in any of these exhibits?
MS. BROWN: I have her affidavit for –
THE COURT: Give her the affidavit and just for the purpose of refreshing her recollection without -- just let her look at her affidavit.
A. I think the portion that I'm having difficulty with in your question is the word, the use of the word "retaliation".
As I stated here, I do not recall how I first learned Robbyn Brown had sought DEO counseling; however, after the DEO investigator advised it was in May of '96, I reviewed my Franklin planner, and noted an entry on 5/11/96, which was a Saturday.
MR. LLEWELLYN: Can I ask that no more of the affidavit be read, please.
THE COURT: Don't read from the affidavit. I just wanted you to look at the affidavit for purposes of refreshing your recollection. That was all.
BY MS. BROWN:
Q. Ms. Swain, isn't it true that initially you advised the EEO counselor you were not aware of any EEO complaint filed by

24 me until July 10th of 1996?
25 A. I need to make a correction. You called me Ms. Swain.

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1 Q. I'm sorry. I'm a little tired. Go ahead,
2 Ms. Featherstone.
3 A.I had not remembered, and when it came up again, I did
4specifically indicate to the counselor that I didn't recall for
5sure and asked her, I said, you know, am I missing something
6 here? Was there a counseling session prior to that? Because I
7 honestly did not remember. When I filed my first affidavit, I
8 indicated the truth as I remembered it. I did not recall.
9 However, when she indicated to me that it was in May, that is
10 when I did go back and check to see if I had any notes to that
11 effect.
12 Q. Okay. Isn't it also true that you advised Bob Graf, in
13 August of 1996, you were not aware of my EEO complaint?
14 A.I don't recall if I advised Bob Graf of that or not. It
15 was just a matter that I did not recall.
16 Q. Okay. But isn't it also true that, based upon your
17 initial position that you weren't aware of my EEO complaint,
18 didn't you also maintain that you could not therefore have
19 retaliated against me?
20 A.I didn't -- you know, I didn't recall. When I went back
21 and checked my Franklin planner, I --as I sometimes do work on

22 the weekends, I will check my voice mail and I went back
--
23 after the counselor indicated to me that you had filed
24 something in May or had a counseling session in May, I
went
25 back to check because I wanted to be sure. I wanted to be
sure

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1that I was being accurate, and I honestly did not have a
2recollection prior to that.
3 Q. Okay. Isn't it true that in February of 1997, you also
4maintained that you didn't have any recollection -- I'm
sorry.
5Let me tell you what happened or give you the background.
6Isn't it also true that in February 1997, in a meeting between
7a second level grievance meeting between you, myself, and
8Bob Graf, you maintained that you didn't have knowledge
of the
9 EEO complaint until July 10th of 1996, isn't that true?
10 A. I don't recall that specifically what you're referring
11there to, but if I made reference to that in the meeting, it
12was because I didn't recall it at that point. I just probably
13didn't remember it at that point during that meeting.
14 Q. And that would have been February '97?
15 A. I'm not sure of the dates right at the moment, but --
16 Q. Your affidavit over here is dated July 18th – I'm sorry.
17 The statement you provided here, that was July 1997, is
that
18 correct? I can let you see it.
19 A. I'm not sure which affidavit you're referring to right at
20 the moment. May I look at other parts of it?
21 Q. I just want the dates.
22 A. This affidavit is dated July 18th of '97, and in that
23affidavit I indicated that I did not recall when I had learned

24 about your counseling session. I corrected it in that
25 affidavit because after the counselor told me that it was in

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1May, I went back and checked my Franklin planner notes because
2 I hadn't recalled it before that. I didn't remember it.
3 Q.Your Franklin planner, for those who may not know, what
4 exactly is that? Is that where you jot down -- is that like
5 your calendar?
6 A.Franklin planner is like a day planner where you indicate
7 appointments, other notes of conversations that you may have in
8 a particular period of time.
9 Q.And so then you didn't check your -- is it your testimony
10 you didn't check your day planner from May of 1996 up until
11 July of 1997?
12 A.I would have had no reason to because I didn't remember
13 that there would have been any events. So it's only after the
14 counselor indicated that it was that time, I thought, you know,
15 I will go back and check.
16 Q. Okay. Mrs. Featherstone, isn't it true you made the
17 recommendation for the Grade 13 temporary promotion in 1996, to
18 Patricia Leatherwood?
19 A.That would be -- which temporary promotion?
20 Q.I'm sorry. In Fairview Heights.
21 A.Yes, that would be correct.
22 Q.And isn't it also true that you made the recommendation to

23 Patricia Leatherwood for the Temporary -- I'm sorry, the
24 Permanent Grade 13 Revenue Agent position in 1998, for
the
25 Fairview Heights Revenue Agent position?

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Excerpts from Richard Knowles' Trial Testimony – Day 4

1 I'll overrule your objection, Miss Brown.
2 MS. BROWN: Mr. Knowles, if I could -- Your
3 Honor, motion to admit Exhibit Number 55.
4 THE COURT: Well, you have to lay a foundation
5 for it first, Miss Brown.
6 MS. BROWN: I already have. These are the
7 automatic referral cases from Mr. Knowles, the schedule
that
8 he provided to --
9 THE COURT: Well, by laying a foundation, what
10 I mean is you'll have to ask Mr. Knowles if he can identify
11 this exhibit.
12 MS. BROWN: Oh, I'm sorry. I'm not a lawyer.
13 Q. (MS. BROWN:) Mr. Knowles, can you identify this
14 document for me, please?
15 A. Okay. Looks like probably what I turned in when they
16 asked about some of these cases.
17 Q. Does it look like your writing?
18 A. Yes.
19 MS. BROWN: Your Honor, has foundation been
20 laid?
21 THE COURT: He still hasn't testified as to
22 what it is.

23 MS. BROWN: Okay.
24 THE WITNESS: It's my writing, and what I did
25 is I went back and found out who all the taxpayers were that

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1 came out of that Grand Jury case, made notes of any related
2 returns that came along with it, where they were initially
3 assigned to, and how we moved them out of the groups after
4 that.
5 MS. BROWN: Okay. Motion to admit Exhibit
6Number 55, please.
7 THE COURT: Any objection?
8 MR. LLEWELLYN: No objection.
9 THE COURT: Be admitted.
10Q. (MS. BROWN:) I apologize. It's a little blurry, but
11 at the top does it state "Automatic referral cases per Robbyn
12 Brown"?
13A. Yes.
14Q. So this would have been in response to an inquiry I had
15 made?
16 A. Yes.
17 Q. Over to the left-- I'm sorry, this is Page 55. It's
18 extracted from the -- one of the investigative files, and
19 it's noted "Page 1226," but over to the left, this column,
20 you're indicating the taxpayer, is that correct?
21A. If I remember right, what I did is I went through the
22 different names and used the first initial so we wouldn't
23 have any disclosure issues.
24 Q. I understand. And over here are you indicating where

25 the returns were assigned?

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1 A. Where they were initially assigned, right.
2 Q. And "'WM," does that mean white male?
3 A. Yes.
4 Q. Grade 12?
5 A. Yes.
6 Q. Would this have been Tim Neighbors?
7 A. Yes.
8 Q. So, let's see. You have 17 cases that we know of that
9 you reconstructed that were assigned initially to Tim
10 Neighbors?
11 A. I can only see through ---
12 Q. I'm sorry?
13 A. 17.
14 Q. I'm sorry?
15 A. I think it is 17. It's 17 or 18, but --
16 Q. But then over to the left, based upon this
17 reconstruction that you provided, all of those cases were
18 assigned to a white male Grade 12?
19 A. Correct.
20 Q. Would that have been Tim Neighbors?
21 A. Yes.
22 Q. Now, upon Tim Neighbors' promotion to the Grade
13,
23 were these cases then reassigned?
24 A. We started the reassignment before he got that
25 selection. Okay. The plan that we had worked out was we

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1 didn't have any information except for what was provided
to
2 the Grand Jury.

We went through -- this is a long story, but the original project on these cases started in my group. Had two revenue agents who had worked the case, different taverns, and found the unreported income. And they found that taxpayers were involved in the scheme with an organization that provided illegal gambling.
So that's how the cases got back into my group was the fact we were the source group that they built the case from for the Grand Jury case.
Q. Okay.
A. So when they get back in my group, obviously, the groups have changed from what we had originally, and what we had afterwards. I had other revenue agents that were on Grand Jury cases, and I had trainee agents.
Q. That was just one question I wanted to ask you.
A. Okay.
Q. But again, upon Mr. Neighbors' promotion, those cases were transferred out, some prior, some thereafter?
A. Right.
Q. Were civil fraud referrals made on these returns?
A. On several of them.
Q. Several?
A. Um-hum. I would not know about any of the ones that

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went to Group 8.
Q. Okay.
A. That would be outside my group.
Q.But did Tim Neighbors make referrals on some of these returns?
A. Yes, he did.
Q.Okay. And he would have received a fraud referral memo on these, as well?

A. You know, I couldn't find that many memos on it. As I recall, it went out, but he may have.
Q. Mr. Knowles, Catherine Gilmore testified yesterday that
on these cases some of the illegal gambling --
THE COURT: Ms. Brown, you can't tell him what another witness testified about.
MS. BROWN: Oh, okay. Can I just say that testimony has been provided?
THE COURT: No. We have a rule on witnesses, so one witness can't know what another witness testified to.
MS. BROWN: Oh, okay.
Q. (MS. BROWN:) Isn't it true, Mr. Knowles, that some of
the gambling income had been reported on those cases?
A. I don't know.
MS. BROWN:Okay. Can I tell him now?
THE COURT: No.
MS. BROWN: Oh. I'm just prohibited from

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telling him at all? Okay.
Q. (MS. BROWN:) Mr. Knowles, if I could direct your attention to Exhibit 8 previously admitted into the record—
hasn't it?
Oh, I make a motion to admit Exhibit Number 8.
MR. LLEWELLYN: No objection, Your Honor.
THE COURT: Be admitted.
Q. (MS. BROWN:) Mr. Knowles, does this document look
familiar to you?
A. Yes.
Q. What is it?

12 A. It's--it looks like it's a memo from Revenue Agent
13 Neighbors about potential conflict of interest that might
14 appear or take place on some of these cases -- on some cases.
15 Q. Now, isn't it also true that it's the policy of the
16 Internal Revenue Service to avoid the appearance of a
17 conflict of interest?
18 A. Well, sure it is.
19 Q. Okay, thank you. If you could go down to the bottom of
20 the exhibit. Is this your writing?
21 A. Yes, it is.
22 Q. And can you read it for us, please?
23 A. "Tim, thank you. Since the majority items are already
24 determined, i.e., the gambling income from whatever, also you
25 will be working primarily with power of attorneys, POA's, and

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1 due to related criminal charges and plea agreements, while I
2 agree you are in a tenuous position, the
3 customer/government's rights " --
4 THE COURT: Hand him the document. Maybe it
5 will be easier to read it.
6 THE WITNESS: It gets cut off at the bottom.
7 MS. BROWN: Okay.
8 THE WITNESS:"The government's rights – the
9 customer's/government's rights do not appear conflicted.
10 Press on."
11 Q. (MS. BROWN:) Thank you. So with that in mind, you
12 state that some of the gambling income has already been

13 reported, already been determined. I don't want to put words
14 in your mouth, but it's already been determined, and you also
15 state further, is it true, that some of this information was
16 determined by plea agreements?
17 A. Um-hum.
18 Q. Isn't it true that I prepared those, some of those plea
19 agreements?
20 A. See, I don't know what -- I don't know what you did in
21 the Grand Jury.
22 Q. Okay, that's fine.
23 A. But I do know, if it came out of the Grand Jury's
24 public record, then we can use it.
25 Q. Correct. But the point being, I was in Grand Jury, and

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1 isn't it one of the responsibilities of an expert witness
2 assigned to Grand Jury to prepare plea agreements?
3 A. Well, it may be one of the things that they are
4 required to do, right.
5 Q. Okay, thank you. Mr. Knowles, if I could direct your
6 attention back to Exhibit 55?
7 A. Okay.
8 Q. Towards the bottom here, you have two of these cases
9 being transferred from what you've said, or from Tim
10 Neighbors, and to a white female that's a Grade 11?
11 A. Um-hum, yes.
12 Q. Correct? Did this white female receive an award out of
13 this?
14 A. I don't know.
15 Q. Was she given a temporary Grade 12, seeing that Tim

was 16 working the cases prior?
17 A. No.
18 Q. No. Did she receive a higher grade of duty pay?
19 A.Well, she would have only done that if she exceeded 25
20 percent of her time. Just because you have a case does not
21 mean that you get -- you qualify for higher grade.
22 Q. We'll go into that later. I'm just asking yes and no
23 right now.
24 Did you make an analysis as to whether or not higher-graded
25 duty pay was applicable?

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1 A. Well, you know, if you remember yesterday, we talked
2 about --
3 Q. Is it yes or no?
4 A.I do it all the time. That's one of the things you do
5 all the time.
6 Q. So in that situation you did, and you determined --
7 A. That they would not have qualified. One or two cases
8 would not have made it mandatory to do that.
9 Q. Okay. Did you discuss it with the employee?
10 A. I don't remember.
11 Q. Okay. But again she was assigned the returns from the
12 Grade 12, and not -- without a temporary promotion?
13 A. Yes.
14 Q. Mr. Knowles, isn't it also true that fraud referrals
15 are integral components of the examination business plan?
16 A. Well, that's why -- what we do, yes.
17 Q. That's why we are here?
18 A. That's one of the things we do. It's just an outcome
19 of what we do.
20 Q. You're not saying that's why we are here, to just set
21 up fraud, are you?

22 A. Oh, no.
23 Q. It's also looked upon very favorably, isn't it?
24 A. Sure.
25 MS. BROWN:Okay. Mr. Knowles -- I would like

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*********

1 A. Well, when she's been my manager, I have, yes.
2 Q. You have had occasion to review or see her writing; is
3 that correct?
4 A. Yes.
5 THE COURT: What exhibit is this?
6 MS. BROWN: Exhibit 2, Page 2.
7 Q. (MS. BROWN:) Does this look like Mrs. Featherstone's
8 writing to you?
9 A. It could be.
10 Q. Okay. Over here where it has "temporary"?
11 A. Um-hum.
12 Q. Well, the "GR" at the top, does that indicate the grade
13 level of these particular employees?
14 A. Yes, I believe so.
15 Q. So, over to the left, would that indicate that these
16 employees were -- let's say they were temporary 13's?
17 A. Who now?
18 Q. I'm sorry, you don' have it up that far. A thousand
19 pardons. Billy Langfelder and Sharon Whitten.
20 A. Temp 13's?
21 Q. Correct?
22 A. That's how I would look at that.
23 Q. Isn't it true -- Mr. Knowles, this is Exhibit 2, Page
24 3. Larry Hardin, isn't it true he worked out of our office
25 as well?

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BEST AVAILABLE COPY

A. Yes.
Q. And he was a temporary 13?
A. Correct.
Q. Okay. Pete -- Pierre Whitley, a temporary 13?
A. Right.
Q. Debris Windland, temporary 13, correct?
A. Yes.
Q. Judy Lawrence, temporary 13?
A. It's not on the screen.
Q. Okay. Correct?
A. Yes.
Q. I'm sorry, going back to Exhibit 2, Page 3, the Branch 7 staffing, and Robbyn Brown, isn't it true that would be me?
A. Yes.
Q. Grade 12?
A. Yes.
Q. Mr. Knowles, isn't it also true that all of these individuals that were reflected as temporary 13's, isn't it also true that during the IRS reorganization they were reassigned to LMSB, being large and mid-size business?
A. Yeah, I believe that all -- well, I don't know about the temporary 13's, I know the permanent 13's did. I don't know about all the temporaries.
Q. Larry Hardin, he was a temporary 13; is that correct?
A. At one time, yes.

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Q. Was he not transferred into LMSB?
A. I'm not sure. Larry went to St. Louis, but I'm not sure what he went --
Q. Well, prior to St. Louis, isn't it true he was also working out of our office under the management of Lynn Glauber as a temporary 13?

7 A. He might have been. I don't remember.
8 Q. And Lynn Glauber, is it true, was the LMSB manager, or
9 is the LMSB manager?
10 A. Yes, she is.
11 Q. Can you distinguish SBSC from LMSB for the Jury,
12 please?
13 A. Sure. When they did the reorganization, they tried to
14 put us in work units that matched the work. So, SBSC is
15 small business, self-employed individuals, and those are
16 general businesses that most of us are in contact with
17 everyday; and then they set up what they call LMSB,
which is
18 your large, mid-size businesses, and that's your big
19 corporations.
20 Q. Thank you, Mr. Knowles. Isn't it also true that I was
21 transferred to LMSB?
22 A. Well, actually I think you applied for that and was
23 selected.
24 Q. There wasn't a promotion process for that; is that
25 correct?

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1 A. Well, as I understand, they had a window of
opportunity
2 for people who were Grade 12 that wished to go into
LMSB to
3 fill out an application, and they selected off that roster
4 somehow.
5 Q. But this wasn't a competitive promotion; isn't that
6 correct?
7 A. You mean like we typically would do it?
8 Q. Correct.
9 A. No. You had to prepare a document and put down what
10 you worked on.
11 Q. When you say "what you worked on," it would be

type of
12 cases?
13 A. Type of cases, activity codes, what you did, and then
14 they selected off of that.
15 Q. Okay. Isn't it also true that you had to compute your
16 examination time for certain activity codes?
17 A. I think so. I wasn't involved in that.
18 Q. You didn't have any employees that opted to go in or
--
19 A. Well, I think we did.
20 Q. But they weren't selected?
21 A. But they weren't selected, right.
22 Q. That's correct. Isn't it also true that I was the only
23 Grade 12 that went over based upon the hours that I
worked?
24 A. I don't know.
25. Q. Isn't it also true then that you could only go into

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1 LMSB if you had worked higher grade cases, your DET
time,
2 direct examination time, reflected that you had worked
3 higher-graded cases?
4 MR. LLEWELLYN: I'm going to object at this
5 point, Your Honor. This is subsequent to the '98
promotion.
6 I think it's irrelevant.
7 MS. BROWN: No, Your Honor, it's highly
8 relevant. It's highly relevant.
9 Q. (MS. BROWN:) Mr. Knowles, did they not look at a
time
10 period prior to 1998 when you went into the LMSB to
make that
11 computation?
12 THE COURT: You know, there's one thing about

13 making an objection and you make a response, and you got to
14 give me a chance to make a ruling.
15 MS. BROWN: I'm sorry.
16 THE COURT: All this IRS talk is really way
17 beyond me, but I really fail to see the relevance at this
18 point. I'm going to give you some latitude, but I think we
19 are going pretty far afield. But I'll give you some latitude
20 at this point and overrule the objection.
21 Q. (MS. BROWN:) Maybe you aren't the one to answer this,
22 Mr. Knowles, but you said you did have employees that did the
23 computation. Isn't it true that that computation covered
24 work performed during 1998 and 1999? Well, I'm sorry, I'll
25 retract.

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1 A. I don't know.
2 Q. I'll withdraw that question. The reorganization, isn't
3 it true, took place prior to the year 2000?
4 A. I think that's correct.
5 Q. That's correct. So then they would have been looking
6 at time spent on cases prior to the year 2000 in order to
7 make a determination?
8 A. Sure.
9 Q. Okay.
10 A. I think so.
11 Q. Mr. Knowles, isn't it also true that I returned from
12 LMSB -- this requires a yes or no response, if you would
13 indulge me -- I returned from LMSB back to SBSC in January

14 2002?
15 MR. LLEWELLYN: Same objection, Your Honor. I
16 think we are going way beyond the scope of this trial.
17 THE COURT: Well, I'll give her this question.
18 You can answer this question, but we are going to move
on.
19 THE WITNESS: Yes, you did.
20 Q. (MS. BROWN:)And you testified previously that you
21 were acting as the acting group manager for two groups,
both
22 Group 3 and Group 4?
23 A. Correct.
24 Q. So then you would know whether or not I went into
LMSB
25 because I came back to one of those groups; is that
correct?

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1 A. Correct.
2 Q. So the answer to that question that I previously posed
3 to you was that I did go into LMSB?
4 A. Yes.
5 Q. Thank you. And again, you said LMSB worked the
6 higher-graded cases, corporate cases, things of that nature?
7 A. As far as I know. There is several grade levels
8 available for every work unit.
9 Q. Okay, but isn't it true that the cutoff for LMSB at
10 that time were cases that were five million and above?
11 A. I think that's right.
12 Q. Okay. And they did make a determination at one
point
13 to reassign the Grade 12 revenue agents that have been
14 assigned to LMSB back to SBSC; is that correct?
15 A. I don't know if they did or not.
16 Q. Isn't it true that they increased the threshold in LMSB

17 from five million to ten million?
18 MR. LLEWELLYN: Your Honor, I have to continue
19 to object. I mean, there is nothing with regard to anything
20 in this case that she's questioning this witness about for
21 the last 10 or 15 minutes.
22 MS. BROWN: I disagree, Your Honor.
23 THE COURT: Well--
24 MS. BROWN: It goes directly to the failure to
25 promote cases. My position is that I have worked

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1 those particular cases -- I'm sorry.
2 THE COURT: You're talking about now
3 well beyond the period of time in '98. You're talking about the
4 present time.
5 MS. BROWN: No, sir. With all due respect, in
6 order to -- and if Mr. Knowles can't establish it, another
7 witness will -- in order to even go into LMSB --
8 MR. LLEWELLYN: Side-bar, Your Honor?
9 (Side-bar, on the record.)
10 (The following proceedings were held
11 out of the hearing of the jury.)
12 THE COURT: During what period of time are you
13 talking about that you're doing this LMSB?
14 MS. BROWN: When the IRS reorganized --
15 THE COURT: Answer my question.
16 MS. BROWN: When I went into LMSB, it was
17 actually 2000, but in order to -- no, no, let me finish, Your
18 Honor. In order to go into LMSB, if you were a Grade 12 --
19 THE COURT: When did you become a Grade 13?
20 Answer my question.

21 MS. BROWN: I wasn't a Grade 13 in LMSB.
22 THE COURT: Answer my question. You have a
23 habit of when I ask a question of not answering my question.
24 MS. BROWN: I'm sorry. I became a Grade 13 in
25 January 2002. I'm not talking about that.

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1 THE COURT: Okay. So you went to LMSB in the
2 year 2000. What's that got to do with your 1998 failure to
3 promote?
4 MS. BROWN: It has everything to do with it,
5 Your Honor, because in order to go into LMSB, they looked at
6 the time that you put in in 1998 and 1999 to make a
7 determination whether or not you could even go in it as a 12.
8 The Grade 13's automatically went in. The
9 Grade 12's, Teola Briggs is going to testify that they had to
10 go in and look on ERCS and get all of your time for the
11 higher grade cases that you worked, and then do a
12 computation. So it wasn't, you know, a shoe-in that you
13 went. You had to actually have performed in that level. My
14 position has always been that I had been doing that work.
15 Now, if I'm the only Grade 12 that went in,
16 the other individuals who were sitting on a Grade 13, meaning
17 that work was identified for them as a Grade 13, I went in as a
18 Grade 12 because I was working the Grade 13 cases. I was
19 the only one --
20 THE COURT: But your contention is that they

didn't give you the higher grade cases?
MS. BROWN: No. My contention is that I worked those cases, but I didn't get paid for or get recognized for it. This demonstrates that my time, based upon a time that they had available to them on our ERCS

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reports, it demonstrates that I was working those cases. How else could I have gotten into LMSB? Again, they looked at the time period from '98.
THE COURT: If they didn't give you credit for it, how could they have then found in the records that you were working it? They apparently did give you credit for it.
MS. BROWN: No, no, Your Honor. I know it's confusing because it's IRS, but let me explain. In order to go into LMSB, they had to go in and go back on ERCS, and I'm going to have Richard tell us about that, ERCS contains activity codes, time on cases, all of that information is compiled That doesn't equate -- we are talking about two separate things. Higher-graded duty pay and a temporary promotion does not equate to the same thing. In other words, I work on cases. When the cases come in to me, there is an activity code assigned to them. There is a source code showing how they came in. Activity code, you may not remember, was based upon the size of the companies. LMSB made a determination that we will allow some 12's. I think

there was only about 200 in the country. Illinois only got 11. Out of those, 11, seven came from the downstate area.
Seven of those included me. All of the other individuals were Grade 13's. The Grade 13's didn't have to compute their
time.
My time reflected that I had been doing that

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work back in 1998, which was not considered in the promotion
package. Their position has been, no, I hadn't been doing the work, but if I went into LMSB, I had to have been doing
the work based upon the activity codes. It was 1998 that they used. Teola Briggs can testify they had to go to a time
period before that to make that determination.
MR. LLEWELLYN: The nonselection in 1998 had nothing to do-- it considered 1997 in her evaluations. She's talking about stuff subsequent.
MS. BROWN: That's not true. That's not true, Your Honor.
MR. LLEWELLYN: That's my position.
MS. BROWN: Look at the evaluations for --
MR. LLEWELLYN: It's totally outside the scope of the case and it's irrelevant. And it's wasting this Court's time, and this jury's time, and all of our time.
MS. BROWN: Me thinks he does protest too much. In order to look at what he says goes up beyond the scope of 1998 promotion, that's absolutely false. If you
look at my evaluation, it's dated April 20, whatever, 1998.

Do you have something to add, Miss Dow?
MR. LLEWELLYN: No, no. We have nothing further.
MS. BROWN: He's getting frustrated because he knows that I'm making a point and I'm right.

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THE COURT: Well, I'll let you do it.
MS. BROWN: Thank you, Your Honor.
(The following proceedings were held in the presence and hearing of the jury.)
MS. BROWN: Those side-bars tend to throw me off a little bit. Where were we?
Q. (MS. BROWN:) We were talking about the LMSB. And again, you have been the acting group manager for both Groups 3 and 4?
A. In SBSC, yes.
Q. SBSC. And I was returned, or I have been reassigned back to SBSC; is that correct?
A. You are now on SBSC, yes.
Q. So you were in a position to know that I had been in LMSB?
A. Yes.
Q. Thank you. Mr. Knowles, if we could, please, I would like to discuss the acting group manager assignments. Plaintiff's Exhibit 54, Pages 1 through 5, are you familiar with that document?
THE COURT: 1 through 5 or 1 through 6?
MS. BROWN: Oh, do you have six? I'm sorry, there's another document. It's Page 6, but I'll ask you that one in a minute.
Q. (MS. BROWN:) If you could, Pages 1 through 5, are

you

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MR. LLEWELLYN: It's been asked and answered.
MS. BROWN: I'm getting confused because he's equivocating, here, you know, maybe it is, maybe isn't.
THE COURT: I thought he said that your question was accurate.
MS. BROWN: Okay.
THE COURT: The way you posed the question was accurate.
Q. (MS. BROWN:) Mr. Knowles, if I could direct your attention to Exhibit 54, Page 6?
A. Okay.
Are you familiar with -- would that be something that's pulled down from ERCS?
MR. LLEWELLYN: 56?
THE WITNESS: It's Exhibit 54, Page 6. That looks like it's part of -- looks like it's part of your hundred percent --
MR. LLEWELLYN: Your Honor, 54 --
THE COURT: She only talked about Pages 1 through 5 a while ago. She didn't ask about Page 6. Miss Brown, continue on with your witness.
Q. (MS. BROWN:) I'm sorry. You were saying?
A. Yeah This looks like it's part of it. It says "Page 8." There is several reports this would come out of, but someone generated a report and it has a list of case name,

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activity code, hours, age, that kind of stuff on there.
Would these kind of things be kept in the ordinary

course of business?
A. These would, yes.
Q. Okay. And over here, would that --
I'm sorry, motion to admit Exhibit Number 54,
Page 6.
THE COURT: What is it? I mean--
MS. BROWN: It's a report generated by ERCS.
THE COURT: I'm asking the witness.
THE WITNESS: It's a listing of, it looks like
a case that was assigned to Robbyn Harris, and it's a case
report as of that time. There's no date on it, but on
whatever date this was pulled out, it was a history of that
case.
MS. BROWN: Okay. And it's been sanitized,
Your Honor, so it doesn't have any protective
information on
it.
THE COURT: But what does it tell us? Does it
tell us the hours worked, or what is it?
MS. BROWN: It tells us the activity code --
THE COURT: I'm asking the witness.
THE WITNESS What's listed here is there's
three lines on it, the tax years, the source code, that's
where it came from, the activity code, how many days in



process, status of the case, the POD, aging codes, but the
total's been scratched out, any project code or statute dates
were scratched out, and the taxpayer name was scratched
out.
THE COURT: Is this a case she worked on as
acting group manager?
MS. BROWN: No, sir. It wouldn't be. What I
just wanted --
THE WITNESS: This would be a case she would

9 work as a revenue agent. It would have been a case assigned
10 to her that she would have worked.
11 THE COURT: Any objection, Mr. Llewellyn?
12 MR. LLEWELLYN: The only objection is Miss
13 Brown has scratched out the cumulative time on that, and I
14 think that's been the issue of the questioning.
15 MS. BROWN: Well, actually, no. The purpose
16 of this particular question, Your Honor, is I want him to
17 identify this activity code information that this report
18 generates.
19 MR. LLEWELLYN: The cumulative time issue is
20 not a protected issue and it's redacted from that document,
21 and that's the issue she's been discussing.
22 MS. BROWN: I'm not limited to discussing
23 other issues, am I?
24 MR. LLEWELLYN: That's not my point.
25 THE COURT: Well, let's go ahead and take our

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1 particular -- he's going to tell you what Activity Code 215,
2 whatever, means, and if any other documents -- that I worked
3 these particular cases during the period of time that I was
4 in his group.
5 THE COURT: Well, but in order to admit this
6 exhibit, the only thing that can be redacted is the taxpayer
7 name.

MS. BROWN: I can do that.
THE COURT: Okay. Then we'll admit --
MS. DOW: And their Social Security number and tax identification number.
THE COURT: Right, right. Then it will be admitted.
MS. BROWN: Okay.
(A recess was held.)
(The following proceedings were held in the presence and hearing of the jury.)
THE COURT: Thanks, folks. Please be seated. Okay, Ms. Brown.
Q. (MS. BROWN:) Mr. Knowles, if I could please direct your attention to Exhibit 23 -- I'm sorry, Plaintiff's Exhibit 63. Can you tell us, are you familiar with that document?
A. This is a printed copy of the Form 4502 that we were talking about earlier, the time input sheets. Once it's been

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input on the ERCS system, then this is a printout that would show time charges for whatever days.
MR. LLEWELLYN: No objection.
THE COURT: Be admitted.
Q. (MS. BROWN:) Okay. Are you able to see that on your screen?
A. Yes.
Q. Okay.
A. The top part of it.
Q. If you could just walk us through this up here. Does this, "Knowles," would that indicate that you were the originator?
A. I'm the one that pulled the report.
Q. You pulled this down from ERCS?

A. Yes.
Q. Over here (Indicating) this indicates what, the employee's name?
A. Employee name.
Q. And that would be me in this particular case, Robbyn Harris?
A. Right.
Q. Well, I'm still Robbyn, but, you know?
A. Right.
Q. Okay. And over here (Indicating) this indicates the activity codes; is that correct?

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A. Right.
Q. Activity Code 217, what would that indicate?
A. That would be, it's a corporate audit. I don't know the actual dollar amount, but it's on the larger side of the corporate audits that we would have.
Q. Okay. And up here (Indicating), this is the day of the month, correct?
A. Correct.
Q. So then, this would show time charges that were applied to those larger cases?
A. In that time cycle that would have been the time that you charged on that case.
Q. Those particular cases?
A. Whatever cases you did that day.
Q. Okay. So we have Activity Code 217, and down here Activity Code 215. Are those corporate returns, as well?
A. Yes, it is.
Q. And over here (Indicating) R-L-R-T, what does that stand for?

20 A. That would be the related returns.
21 Q. So, over here (Indicating), if we have Activity Code
22 534, would those be related to these Activity Codes 217?
23 A. In this situation it would be.
24 Q. Okay. Again, so these are hours worked on these
25 particular cases during that period?

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1 A. Correct.
2 A. And over here (Indicating), these are ending hours,
3 correct?
4 A. Correct.
5 Q. So there had been some activity on these larger cases?
6 A. In this time cycle there was time charged, right.
7 Q. And in prior cycles, if we have ending hours; is that
8 correct?
9 A. Right.
10 Q. Okay. Again, this is Plaintiff Exhibit 63 reflecting
11 time charges for Robbyn Brown.
12 MR. LLEWELLYN: I would like to clarify the
13 date on the top of that document, please?
14 Q. (MS. BROWN:) Okay. The date on this particular
15 document is what, Mr. Knowles?
16 A. It's February 11, 1994.
17 THE COURT: That's just the date printed.
18 What date does it cover as far as the work?
19 THE WITNESS: The time span? December 25, '
20 93, through January 21, 1994.
21 Q. (MS. BROWN:) So you would have had the
opportunity to
22 pull it over several months then?
23 A. Well, the reporting cycles go throughout the year, and
24 they are set by -- this system feeds into our pay system,
and
25 so there is a set of cycles, 12 cycles a year. So they don't

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1 necessarily run a month, but they will run -- they are all
2 predetermined. This is cycle '94, 1994, cycle 1.
3 Q. But you would have had the ability then to pull these
4 type of reports for each one of those cycles?
5 A. Yes.
6 Q. Okay.
7 THE COURT: Let me ask a question, because
8 this doesn't mean anything to me. Look at that very top
9 line beginning hours, it says "190," end hours says "199."
10 Now, what does that mean?
11 THE WITNESS: Going into this time period
12 190 hours charged to that item.
13 THE COURT: Oh, okay.
14 THE WITNESS: And then during this time period s
15 it adds nine, so it's like a running inventory for us.
16 THE COURT: Okay.
17 MS. BROWN: Okay. We did admit that?
18 THE COURT: We did.
19 Q. (MS. BROWN:) Mr. Knowles, I'm looking at
abstracts.
20 These have not been exhibited yet; just want him to
identify
21 them.
22 Your Honor, I'm doing so because I want him to
23 identify if these are the documents that he relied upon for
24 purposes of that reconstruction that wasn't allowed into
25 evidence.

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1 MS. BROWN: Okay, thank you.
2 THE COURT: Exhibit 57 in its entirety will be
3 admitted.

4 Q. (MS. BROWN:) Mr. Knowles, if I could -- if you could,
5 please, can you identify this document? It's Plaintiff's
6 Exhibit 57, Page 15.
7 A. This would be the cover sheet, which is the -- it's the
8 form that's used to show the annual appraisal ratings on the
9 critical elements for each employee. This is for Tim
10 Neighbors. It's December 9, 1993, date.
11 Q. Okay.
12 A. Tells us that he's a revenue agent, works in exam, what
13 dates are covered by the evaluation, what grade he was at,
14 the series -- there's a revenue agent series, that's just
15 a number there, the standard position description and --
16 position description numbers are those other numbers there.
17 And the reason we are writing this is it's his annual --
18 Q. His annual --
19 A. -- evaluation
20 Q. Okay. Mr. Knowles, I'm sorry, one thing I needed to
21 point out again. Exhibit 57, Page 15, you were the group
22 manager or you were the preparer of this evaluation; is that
23 correct?
24 A. I am the writer, yes.
25 Q. The writer, okay. Can you identify this document?

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1 It's Plaintiff's Exhibit 57, Page 16.
2 A. Well, these are the elements. There is a narrative
3 required, and that has changed over the years how much needs

4 to be put in, but just kind of put -- what I try to do is put
5 a synopsis, and that's what this would be, of what happened
6 in that year during that rating period.
7 Q. Okay. Mr. Knowles, in this paragraph here -- it looks
8 like the first, second, third, fourth paragraph. If I could
9 direct your attention to that paragraph?
10 A. Um-hum.
11 Q. The first line, it says that -- well, why don't you
12 tell us what it says?
13 A. It says during that period he was assigned a group of
14 returns related to a Supreme Court case.
15 Q. Okay. And if these returns were related to a Supreme
16 Court case, would this have been some type of project then?
17 A. Typically what happens, if a case goes to the Supreme
18 Court, people who have the similar issues are put in abeyance
19 until the key case is determined, and then whatever that
20 determination is, we do the same thing with all the other
21 cases.
22 Q. Okay. What about cases that are not -- that have not
23 been started at this time? Isn't it true that the IRS also
24 did projects?
25 A. We do projects, yes.

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1 Q. Okay. So if there was widespread impact, the IRS would
2 initiate a project, is that correct?
3 A. Yes, we do.
4 Q. Okay. Project returns are -- isn't it correct that
5 project returns are not DIF related returns?

A. That is right.
Q. So if the Supreme Court had already decided upon that
issue, that issue would have already been decided for
purposes of the audit; is that correct?
A. Yes, on that issue, right.
Q. Okay. So in that particular situation, would it have
required him to go out and discover or fact-find on anything
if the Supreme Court has already decided upon it?
A. I don't remember this case but, typically, if that case
was in abeyance, we would already know the facts of the
situation. It would just be a matter of handling all the
paperwork to get the volume out, to make all those contacts,
determine if the taxpayers agreed or not. You know, just do
all the processing on it.
Q. But you don't have to really go out there and look
through books and records if the issue had already been
identified?
A. Usually not.
Q. So those would be like preidentified issues?
A. Correct.

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Q. Thank you. Mr. Knowles, I'll go back to that Page 16
of 57. In there you say the cases that were assigned, total,
144 returns. That's quite a bit for a revenue agent, isn't
it?
A. That's very large.
Q. Why did you not assign them to other agents?
A. I have no idea. In fact -- I don't know.

8 Q. This is Exhibit 57, Page 18. Actually, it's landed in
9 the right spot. Mr. Knowles, on that first paragraph it
10 makes note of the need for excise and employment tax,
that
11 Tim would have noted the need for excise and
employment tax
12 examinations, correct?
13 A. Right.
14 Q. Isn't it true that we have particular positions for
15 excise agents or people that specialize in excise taxes
and
16 in employment taxes?
17 A. Yes, there are. There are specialists.
18 Q. Specialists in those particular fields?
19 A. Yes.
20 Q. Those are unique positions; is that correct?
21 A. Yes.
22 Q. So they are not necessarily Grade 13 revenue agents,
23 income tax agents?
24 A. No, they are not.
25 Q. Thank you. Mr. Knowles, I may be asking you to go
back

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1 a little further, but not further than '93, in one of these.
2 I apologize to the Court. I had a late night.
3 You also identified a personal holding company
4 tax case for Tim, too, is that correct?
5 A. I identified one?
6 Q. You don't remember?
7. A. I don't remember.
8 Q. Okay. Can you tell us what exactly is a personal
9 holding company?
10 A. When a corporation just builds its equity, and builds,
11 and builds, and builds it, and doesn't pay it out -- wait a

minute. That's excessive retained earnings.
A personal holding company is when the type of
assets that you're holding onto in that entity generate
income that should be taxed at a higher rate, that we go in and
assess an additional tax on it.
Q. And those are pretty rare? Those type of issues are
pretty rare to find, is it not?
A. We haven't had a lot of them.
Q. Lot of them. This is still Plaintiff's Exhibit Number
57 Page 19. If you could please read that line?
A. "This corporation had been identified by me for that
agent as a personal holding company."
Q. So again, you identified a personal holding company
case for Tim?

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A. No, it was for a different agent.
Q. For a different agent, but you subsequently transferred
that case to Tim?
A. Yes.
Q. And again, these are unique type of issues?
A. Um-hum.
Q. Thanks. Mr. Knowles, this is Exhibit 57, Exhibit 57,
Page 22. Can you hear me? This is Exhibit 57, Pages --
THE COURT: You'll have to go back to the
microphone.
Q. (MS. BROWN:) I'm sorry. What are the pages?
A. 22, 23, 24, 25.
Q. What exactly is that document?
A. Well, it's -- it's a narrative on the evaluation for, I
guess it's Tim. Looks like it printed funny. November 2,
'93, to November 1, '94.
Q. In the narrative you also mention that personal
holding

18 company case. I didn't highlight it, but can you just peruse
19 through it quickly and -- this then would have been the
20 subsequent years' narrative attached to his evaluation, would
21 that be correct?
22 A. I think that's right. What do you want me to do?
23 Q. You make mention of that personal holding company case?
24. A. I'm not certain this is the same case.
25 Q. Let's see. So then would he have had another one in

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1 1994?
2 A. I know he's had more than one in his career.
3 Q. So You've testified that you gave him one in 1993?
4 A. Right.
5 Q. Did you give him other ones since?
6 A. Well, I wouldn't have known --
7 Q. Let me ask you this question then. Managers are
8 responsible for assigning returns to revenue agents, are they
9 not?
10 A. Yes.
11 Q. When you are assigned returns, do you not do a cursory
12 review of those returns prior to assigning them?
13 A. Yes.
14 Q. Isn't it correct you also go in and determine the grade
15 level of those cases?
16 A. Yes.
17 Q. You also go in and determine what issues are there,
18 just a cursory review?
19 A. Yes.
20 Q. Okay. So would it be fair to state then that you would

have made -- you would have reviewed these returns prior to
assigning them to Tim?
A. Yes.
Q. And some of these returns had personal holding company
issues on them.

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A. But I may not have been the one that identified it.
But you can't say for certain that you did or didn't;
is that correct?
A. Correct. The only one I can say I did is the one that
I wrote that I did.
Q. But prior to me showing it to you, you didn't remember
that you assigned that one to him?
A. Oh, no.
So would it be fair to say you wouldn't remember if you
assigned it on these subsequent years, either?
A. No.
Q. Okay. But we do know that you didn't state it in the
'94 evaluation that you had identified these issues, correct?
A. Is that 93's?
Q. We are talking about 1994's narrative now.
A. Did I identify those issues?
Q. Correct.
A. I don't think so.
Q. You don't state that. So a person reading this
wouldn't have any idea whether you set up the issue or
identified the issue, or Tim identified the issue; is that
correct?
A. That's correct.
Q. One of the critical elements for a revenue agent, it is

issue identification, is it not?

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A. Correct. It was at that time.
Q. Okay. And during that time, also, one of the critical elements for a revenue agent was fact-finding?
A. Correct.
Q. Now, you've testified that, with these project kind of cases, there is not too -- well, I'm probably paraphrasing here, but is it your testimony that there is not too much fact-finding that goes on with those cases?
A. Well, every case is different. There are some projects it just identifies that type of industry, and you still have to do all the work that you would normally have to do.
Q. But then there are some projects, too, that identify not necessarily the industry, but the issue; isn't that correct?
A. Right.
Q. So that would be a preidentified issue?
A. Yes.
Q. Okay. Mr. Knowles, were you asked to provide information on source code returns, or returns assigned to your agents by source code?
MR. LLEWELLYN: I'm going to object. Time frame, scope, elements?
MS. BROWN: Okay, 1994 through 1996.
THE WITNESS: As part of?
Q. (MS. BROWN:)Any issue. Have you at any time ever

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been asked to provide that information?
A. I don't think so.

3 Q. Okay. But had you been asked to provide that
4 information, it would have been easy enough then to just
go
5 on ERCS and get source code information?
6 MR. LLEWELLYN: I'll object, Your Honor. He
7 answered the question. He doesn't think so.
8 THE COURT: Her question was had he been
9 asked, could he have provided it from ERCS. I'll overrule
10 the objection.
11 You can answer.
12 THE WITNESS: Yeah, you could pull off of our
13 source code report.
14 Q. (MS. BROWN:) And you could also pull off project
code?
15 A. Listings, right.
16 Q. Right. So then you would have been able to
determine
17 what agents were assigned what type of returns?
18 A. Correct.
19 Q. Correct. Okay, thank you. Mr. Knowles, during the -
-
20 well, you have testified that I was in your group prior to
21 going to the Grand Jury assignment, or if you have not, is
22 that correct?
23 A. Right.
24 Q. During that time period or prior to going into the
25 Grand Jury assignment, I was working cases; is that
correct?

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1 by you?
2 A. That I signed and prepared it December 12th, 1997.
3 Q. Right. So you prepared Tim's evaluation prior to
4 Mr. Lash retiring?

A. Correct.
Q. With the knowledge that Mr. Lash was retiring?
A. Yes.
Thanks. Plaintiff's Exhibit Number 57 -- oh, I'm sorry.
Mr. Knowles, with respect to that last evaluation that I put up, that would have been for Timothy Neighbors for the period ended November 30th, 1997?
A. Yes.
Q. Isn't it true that that also was the appraisal that was placed in the promotion package for 1998?
A. I believe that's correct, yes.
Q. Okay. If I could, Plaintiff's Exhibit Number 57, Page 1, are you familiar with this document, Mr. Knowles?
A. Okay. That would be the job appraisal for Tim Neighbors for the period ending November 30, 1995.
Q. Okay. And you signed it December 19th, 1995?
A. Yes.
Q. Correct?
A. Um-hum.
Q. The narrative associated with that particular

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Q. You don't know. But you don't remember it being a collection referral?
A. It might have been that. I don't know.
Q. When you are preparing these evaluations -- we went over the '93 and '94 evaluations where there were some preidentified issues -- do you factor that in when you're considering these critical elements?
A. Certainly.
Q. You consider whether or not he's getting the work from someone else and not having to do the work?

A. I consider how they got the case, how they worked on the case, and how they got rid of the case. So if they got it at the very end, that's all that they would get considered for. Of course, you take any case, anything about the life of that case you take into -- if it falls within that calendar period.
Q. Okay. With respect to the 1997 evaluation that was used in the 1998 package, isn't it true that at one point you've stated that you increased his overall rating of record from the prior year's rating, the level. It had been at a Grade 12 level?
A. I think, if I remember right, he worked at a Grade 12, and whatever that overall rating was, the next year as a 13 I dropped his rating. But after the second year at that level he continued to do the work he had done previously and had

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raised that evaluation level up to that same level that it had been before when he was a Grade 12.
Q. But you never stated that he was working at that same level; isn't that correct?
A. I don't understand what you mean. You mean as a 12?
Q. In your previous statement --
MR. LLEWELLYN: I don't know. It sounds like improper impeachment at this point. She's attempting to impeach him with something she hadn't asked him about.
MS. BROWN: I thought I did ask him about a prior statement he had made that he had increased Tim's overall rating of record for the 1997 year to the level it had previously been, as a Grade 12 level.

14 THE COURT: Objection is overruled.
15 THE WITNESS: So, I answer, or what?
16 MR. LLEWELLYN: I think he admitted that.
17 Q. (MS. BROWN:) You admit that. But then the second
18 question was, isn't it true in your statement or your
19 response in a prior statement you made no mention of him
20 performing at a Grade 13 level?
21 A. I may not have.
22 Q. Okay. Well, since you're not sure, I'll show you.
23 MR. LLEWELLYN: Your Honor, I would like to
24 know exactly what they are looking at at this point.
25 MS. BROWN: An affidavit Mr. Knowles

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1 submitted.
2 MR. LLEWELLYN: Page number what?
3 MS. BROWN: 91
4 THE COURT: The question is did you make that
5 statement at that time?
6 THE WITNESS: I typed this, yes.
7 Q. (MS. BROWN:) So again, for the record, you never
8 stated that Tim was working at a Grade 13 level when you
9 prepared that evaluation for 1997?
10 MR. LLEWELLYN: Asked and answered twice.
11 THE COURT: Sustained.
12 Q. (MS. BROWN:) Plaintiff's Exhibit Number 58, Pages 1
13 through 3. Can you identify that document, please?
14 A. This is the standard position description for a revenue
15 agent as a Grade 13.
16 Q. Is that a document normally kept in the normal course
17 of business?
18 A. Yes, it is.
19 MR. LLEWELLYN: What are we looking at?
20 THE COURT: Exhibit 58. He described it as a

21 position description for Grade 13 revenue agent.
22 MS. BROWN: Pages 1 through 3.
23 MR.LLEWELLYN: No objection, Your Honor.
24 THE COURT: Be admitted.
25 Q.(MS. BROWN:) Plaintiff's Exhibit Number 58, Page 2,

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Excerpts of Patricia Leatherwood's Trial Testimony – Day 4

1 the selection of the 1996 Grade 13 temporary position, and
2 the grade -- I'm sorry, I'll let you answer that one first.
3 A. That is correct.
4Q. Would you also have relied upon the recommendation of
5 Deloris Featherstone for the 1998 promotion?
6 A. That is correct. Yes.
7 Q. Were you familiar with any of the applicants in that
8 package?
9 A. What do you mean by "familiar with"?
10 Q. Did you interact with them? Did you know them? Have
11 you had any -- had you ever met any of them?
12 A. I'm sure I've met some of the people. I don't have --
13 I did not have interactions with the people, but I knew of
14 them, yes.
15 Q. Okay. So you knew of them. But did you know their
16 qualifications?
17 A. Other than what was written on the papers, no, I did
18 not.
19 Q. When you say "the papers," would that just be the
20 ranking package?
21 A. The ranking package, correct.
22 Q. Okay. So when you made your recommendation – when you
23 make the recommendation, what exactly is provided to

you?
24 What do you get?
25 A. I don't make the recommendation.

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1 Q. I'm sorry, the selections?
2 A. They make the recommendation to me.
3 Q. What do they provide you? Do they just say "I think
4 this person is the best qualified" or do they provide you
5 supporting documents, or I'm just trying to get a feel of
6 what it is that you review or see before you make the
7 selection, or if it's just this person recommends it and then
8 I do because I trust their judgment.
9 A. Before I make a selection, I received the entire
10 package. And the package consists of all of the documents
11 that have been provided, either from the applicant or the
12 evaluation of the applicant, and the ranking information
13 provided by the ranking panel or the ranking individual, and
14 the certificate, which is the document that I sign selecting
15 an individual, which is -- which ranks the individuals
16 according to their scores from the ranking.
17 Q. Okay.
18 A. So I have that package, and then I entertain a
19 recommendation from the branch chief that I would have placed
20 in charge of the package.
21 Q. Have you ever not accepted the recommendation of the
22 branch chief?
23 A. Yes, I have.
24 Q. Okay. So if you have the package there, you are
25 relying upon the evaluations that are contained in that

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ranking package?
A. That, with the recommendation from the branch chief, yes.
Q.Okay. Mrs. Leatherwood, do you get involved in the -- do you have any review of those evaluations, or -- prior to your selecting, making a selection?
A. No, I don't. Ordinarily not.
Q. So you're relying upon the evaluations prepared by someone else then?
A. I'm relying on the services of the ranking individuals or ranking panels, and the numerical scores and cert that comes out of that process.
Q.Okay. And those evaluations were part of that process?
A. Correct.
Q. Okay. Mrs. Leatherwood, so then would it be fair to state that you're relying upon the accuracy of those evaluations?
A. Yes.
Q. Okay. Would it be fair to say that you're relying upon the lack of bias in those evaluations?
A. Yes.
Q. Okay. You stated, Mrs. Leatherwood, that you were a revenue agent previously, or you came in as a revenue agent?
A. That is correct.
Q. So you're familiar with the auditing process; is that

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A. Yes.
Q. From criminal investigation division?
A. That's correct.
Q. From fallouts from Grand Jury cases?

5 A. That's correct.
6 Q. And isn't it also true that in examination, the fallout
7 from some of those cases, those issues have already been
8 identified?
9 A. No, I would not say that is correct.
10 Q. What would you say?
11 A. What I would say is that that's information that
12 perhaps something is not reported correctly, and then it's
13 the job of the agent to determine whether or not it is
14 reported correctly, and that does require development of
the
15 issue.
16 Q. What about those cases that come in that the issue
17 has -- I'm sorry, let me give you an example.
18 It's Plaintiff's Exhibit Number 8, previously
19 admitted. We'll just go down to the bottom of the exhibit.
20 This particular memo was from Richard Knowles to Tim
21 Neighbors, dated December 21st, 1995.
22 MR. LLEWELLYN:I think it's reverse, from Tim
23 Neighbors to --
24 Q. (MS. BROWN:) I'm sorry, from Tim Neighbors to
25 Mr. Richard Knowles. Are you familiar with Mr.
Knowles?

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1 A. Yes. I know who Mr. Knowles is.
2 Q. Okay. On this particular case they were actually
3 discussing whether or not a conflict of interest is there.
4 And on here he states "Since the major items are already
5 determined, i.e., 5gambling income from" -- well, of
course,
6 he's blacked out the taxpayer's name. So then my question
to
7 you then would be, isn't it true that there are cases where
8 the income has already been determined?

A. Well, I thought the question that you asked me, and maybe I misunderstood your question, whether or not there is a requirement to develop an issue. Having an issue identified and developing an issue are not the same thing. An issue can be identified on classification. That does not mean it's incorrectly reported on the tax return. That's where the agent's skills come in in terms of developing that issue, looking at all of the surrounding facts and circumstances, and then deciding whether or not it is an issue. It's just an identified item, other than that.

Q. I understand. And with what you've just demonstrated, that is typically the case with DIF related returns, is it not?

A. Not necessarily. On DIF related returns, often there is no issue identified. Particularly on corporate returns there is no issue identified, and the agent has to look at

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the return and determine what issues appear to have the most compliance risk, and determine, therefore, what issues they are going to examine.

Q. Would it be fair to state then that since DIF returns do not have any preidentified issues, that it takes more development?

A. Some have preidentified issues and some do not.

Q. Okay.

A. So it depends on whether they are classified and have issues as to whether or not they are going to require the agent to identify the issues. And even if they are identified, the agents also are free to identify more issues

13 on the return, or, to not consider an issue that was
14 identified by the classifier based on the surrounding
15 information that they determine in the course of the
16 examination. They can reduce the scope of the
examination.
17 Q. On this particular memo, Mrs. Leatherwood, this
related
18 to some cases being assigned and a possible conflict of
19 interest. What is the IRS's policies on conflicts of
20 interest, or the appearance of conflicts of interest?
21 A. If an agent or any employee identifies the situation
22 where the objectivity would be compromised, or even the
23 appearance of a conflict of interest, they are expected to
24 talk to their manager and remove themself from that
25 particular assignment. That's in our rules of conduct.

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1 Q. Thank you. Mrs. Leatherwood, when you relied upon
the
2 recommendation of Deloris Featherstone -- I don't know if
I
3 can ask it like that -- were you aware or did you have any
4 knowledge that she may have been the object of former
5 complaints, EBO complaints?
6 A. No.
7 Q. No, you were not aware?
8 MR. LLEWELLYN: I'm going to object. That's
9 assuming facts not in evidence.
10 MS. BROWN: That's what we talked about
11 earlier, Your Honor, that I wanted to avoid any problem
with
12 that.
13 THE COURT: Let's have a side-bar.
14 (Side-bar, on the record.)
15 (The following proceedings were held

16 out of the hearing of the jury.)
17 THE COURT: It's highly unlikely any prior EEO
18 complaints would be admissible, in any event. But what are
19 you talking about?
20 MS. BROWN: Dee was one of the responsible
21 management officials that I had named with respect to the
22 retaliation issues.
23 What I would like to ask Miss Leatherwood

24 would be strictly would you have relied upon her
25 recommendation. I'm in that package and she's making a

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Excerpts from Catherine Murphy's ' Trial Testimony – Day 3

1 Q. What grade level were you at that point?
2 I believe I was Grade 11. That's the journey level
3 grade.
4 Q. What was Tim Neighbors' grade?
5 A. I believe he was an 11, also.
6 Q. During that period of time that both you and Tim,
7 Timothy Neighbors, worked for Lloyd Dinkelman,did you
8 believe that he was being assigned better cases than you?
9 A. Well, I think during that time he was. What I really
10 saw was that the manager spent a lot more time developing
11 cases with Tim than he spent with me.
12 Q. How so?
13 A.Well, he would actually go out and work cases with Tim,
14 and they would come back from the field and say, well, we've

15 developed this issue and this issue, and this case of ours is
16 great, and he would not do that with me. He did not go out
17 and work with me on cases.
18 Q. Okay. Well, how did you know that he was assigning
19 better quality cases to Tim?
20 A. Well, I couldn't really know because case work, you
21 know, we are not allowed to really go into other people's
22 case work. Sometimes we talk different issues in the
office,
23 but we really are not supposed to be into other cases. But
24 the issues he would talk about seemed to be more
developed
25 than the kind of issues I was developing in my cases.

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1 Isn't it true that you stated before that it was
2 obvious that Lloyd Dinkelman was assigning better
quality
3 cases with more potential to Tim Neighbors?
4 A. Well, I believe I've said that before, yes.
5 Q. So your testimony is now that he did or did not—or,
6 what is your testimony?
7 A. That I would perceive that he was getting better case
8 Work than I was, developing better issues, because Lloyd
was
9 Just out there developing the issues right with him.
10 Q. He was working with him?
11 A. Right.
12 Q. You said -- didn't you state previously that it was
13 obvious that Lloyd was assigning better quality cases with
14 more potential to Tim Neighbors?
15 A. I might have said that.
16 MS. BROWN: Your Honor, if she equivocates,
17 the document at that point? Motion to admit.
18 THE COURT: You don't have to admit the

19 document, and it wouldn't be appropriate to admit the
20 document, but you can certainly show her the document.
21 Q. (MS. BROWN:) It's Exhibit 9. Can you tell the Court
22 what exactly this is?
23 A. This is an affidavit that I signed in June of 1997
24 under the name Catherine Gilmore, which was my
previous name.
25 I believe this was on an EEO investigation, and I

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1 THE COURT: The question is whether or not you
2 actually made that statement, and the particular statement-
3 THE WITNESS: Yes, I do have that statement in
4 here.
5 Q. (MS. BROWN:) Okay. If you could –
6 A. When I worked for Lloyd Dinkelman, is that what you
–
7 Q. Sure.
8 A. It says, "It was obvious that Lloyd was assigning
9 better quality cases with more potential to Tim Neighbors,
10 whereas I was receiving cases with little or no potential."
11 Q. Okay. And is that your testimony today, or has your
12 testimony changed?
13 A. No, I would still say that.
14 Q. Okay, thank you. In getting back to the illegal
15 gambling income cases that had been reassigned to you
from
16 Tim Neighbors, why were those cases not assigned to you
17 initially?
18 MR. LLEWELLYN: I'm going to object, Your
19 Honor. That calls for speculation.
20 THE COURT: Well, if you
know. Don't
21 Speculate. If you know, but do not speculate.
22 THE WITNESS: Well, I don't know. The manager

23 Is the one that assigns the cases, and I wasn't the manager
24 at that time.
25 Q. (MS. BROWN:) You weren't even in Tim's group at
that

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1 time; is that correct?
2 A. No, not in '95, '96.
3 Q. Okay. So, those cases were assigned to a different
4 group totally. Those cases were initially assigned to Tim,
5 and after he got the Grade 13 they were assigned to you?
6 A.Well, I don't know about when he got his Grade 13 how
7 that applied, but I got some cases that were originally
8 assigned to him.
9 Q. And again, did you receive any additional
compensation
10 for these assignments?
11 A. No.
12 Q. Did you receive any -- on these particular returns had
13 civil fraud referrals been made?
14 A. Not on the ones that I had received, not the cases I
15 had received.
16 Q. Okay. Did you set up civil fraud referrals on any of
17 these returns?
18 A. No.
19 MS. BROWN:I have no further questions for
20 this witness, Your Honor.
21 THE COURT: Mr. Llewellyn?
22 MR. LLEWELLYN: I don't have any questions of
23 this witness, Your Honor -- I have one question.
24 CROSS EXAMINATION
25 BY MR. LLEWELLYN:

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**AFFIDAVIT STATE OF ILLINOIS**
**COUNTY OF ST. CLAIR**

I, YOLANDA CAROTHERS-THARPE (employed by INTERNAL REVENUE SERVICE (If employed by agency involved in complaint)) as (Title and grade of position) REVENUE AGENT GS- 13 state:- that I am a black female and have sought EEO counseling without management's knowledge, on more than one occasion, but have never filed a formal EEO complaint.

CASE ASSIGNMENT
I have never worked for Richard Knowles, so can not comment on any case assignments to myself. As a previous group manager, I have worked very closely with Richard Knowles. I have not worked in the same group with Tim Neighbors, as best as I can remember, but I do know that Richard Knowles has assigned Tim Neighbors with high dollar potential, i.e. resulting from Grand Jury cases, and other non-dif returns with high dollar potential. I also have knowledge that Tim Neighbors has probably worked the most fraud cases in the last six years. I also have knowledge that Mr. Neighbors has worked the most productive cases in the last six years.

TIME REPORTING
I was the former group manager of Cynthia Manning, group clerk. There was frictionbetween the three Examination Division clerks regarding lunch breaks, and lateness. A meeting was set up with the three clerks and the union steward, as best as I can remember, to resolve the issue. This was one of numerous meetings involving friction between the clerks. In one meeting Cynthia stated that Richard Knowles had asked Shelia Hunt, his group clerk, to record her time. Shelia did not respond to this accusation, and I never

confronted Richard about it. As group manager, I personally kept track of Cynthia's late arrivals and excessive lunch breaks, NEVER asking any other employees to track her time, when I was not there. There may have been occasions were an Acting Group Manager was asked to record her time in my absence. Cynthia was placed on leave without pay in several instances. (NOTE: At the time of this accusation, Cynthia was not Richard Knowles employee).

Page 1 of 3 pages Deponent's Initials:
Form 5991 (Rev.6-81)

**AFFIDAVIT STATE OF ILLINOIS**
**COUNTY OF ST. CLAIR**

ADDITIONAL COMMENTS
I cannot attest to cases being assigned geographically, at all times.

Richard Knowles is a very good writer, therefore providing his employees packages with an "competitive edge" in ranking packages.

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I have read the above statement, consisting of 3 pages, and it is true and complete to the best of my knowledge and belief. I understand that the information I have given is not to be considered confidential and that it may be shown to the interested parties.

/s/ Yolanda Carothers Tharpe
Deponent's Signature

Subscribed and (sworn to) before me at Fairview Heights, Illinois On this 20th day of June, 1997 /s/ J Christopher Madden